81-1029

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; AND BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Petitioners,

v.

JOSEPH TERRELL, JR., WALTER DUDLEY, THOMAS GREEN, JOHNNY LONG, ALBERT MASON, MARCUS OAKES, SAM WALKER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~FIFTH~~ ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals, that seniority systems (held bona fide and nondiscriminatory by the District Court under *Teamsters v. United States* tenets) are *per se* discriminatory because they originated in 1940 in a discriminatory employment environment and perpetuate pre-Act discrimination, is consistent with the *Teamsters* decision.*

Subsidiary Questions:

A. May a transfer of employees between bargaining units pre-Act (1950) be held to infect the seniority systems with illegality and to be actionable consistently with decisions of the Supreme Court.**

B. May the failure to amend seniority systems, held to be legitimate, neutral and *bona fide* by the District Court, be held to show discriminatory intent in the origin and maintenance of the systems, consistently with decisions of the Supreme Court.

II. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F.R.Civ. P. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.**

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*On this issue, certiorari has been granted in *Swint v. Pullman-Standard Company*, No. 80-1193, and petition for certiorari has been filed in *U.S. v. Georgia Power Co.*, No. 80-2117.

**On this issue, certiorari has been granted in *Swint*, No. 80-1193.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties to this proceeding in the Court of Appeals:

United Steelworkers of America, AFL-CIO, and United Steelworkers of America, Local 2140;

Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local 583;

International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 359;

International Molders and Allied Workers Union, and its Local 342;

The Patternmakers League of North America, and Patternmakers Assn. of Birmingham;

"all black persons who have at any time after March 24, 1969 (or who may hereafter be) employed as production and maintenance employees at the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company," a class for which the named plaintiffs were certified as representatives; and

The Equal Employment Opportunity Commission, *Amicus Curiae.*

In the District Court, the United States Pipe and Foundry Company, a subsidiary of Jim Walter Resources, Inc., was a party defendant.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; AND BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Petitioners,

v.

JOSEPH TERRELL, JR., WALTER DUDLEY, THOMAS GREEN, JOHNNY LONG, ALBERT MASON, MARCUS OAKES, SAM WALKER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The International Association of Machinists and Aerospace Workers and the Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Joseph Terrell, et al. v. United States Pipe & Foundry Co., et al.*, entered on May 14, 1981.

OPINIONS BELOW

The opinion of the District Court is reported at 22 FEP Cases 1695 (M.D. Ala. 1979), and is reprinted in the separate Appendix hereto as App. B (1b-27b). The opinion of the Court of Appeals is reported at 644 F.2d 1112 (CA 5, 1981), and is reprinted as Appendix A (1a-31a).

JURISDICTION

The Court of Appeals entered judgment on May 14, 1981. App. C (1c-2c). Timely petition for rehearing was denied on August 7, 1981. App. D (1d-2d). On October 9, 1981, Mr. Justice White extended the time for filing this petition to and including December 7, 1981. App. E (1e). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Sections 703(a), (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g); of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and of Rule 52(a), F.R. Civ.P., are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

A. District Court Proceedings

Respondents filed this class action for employment discrimination on behalf of themselves and other black employees of the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company on October 4, 1972. Jurisdiction in the District Court was based upon Section 703 of the 1964 Civil Rights Act [42 U.S.C. § 2000e-2(c)] and 42 U.S.C. § 1981. The action was brought against the employer and

twelve unions—six local unions and the international unions with which they were affiliated. Prior to trial on the liability issues, a non-prejudicial settlement was reached between all parties on amendments to the seniority system and affirmative relief. Settlement was also reached between the plaintiffs and the Company on money issues.

Summary judgment was granted in favor of the Electrical Workers Unions. The liability issues against the remaining unions [1] were tried on the claim that the seniority systems were not bona fide and had been negotiated and maintained for discriminatory purposes, that the seniority systems perpetuated post-Act the effects of pre-Act discrimination of the Company in hiring, promotion and job placement of employees, and that the Unions (petitioners) had a post-Act duty to revise their seniority systems. It was not claimed that the seniority systems were not facially neutral as to race or that they were applied in a discriminatory manner, but it was claimed that the seniority systems negatively impacted more black employees than white employees in their desire for transfer and promotion. The unions contended that the seniority systems were bona fide and had not been instituted or maintained with discriminatory intent and that they were immunized from liability by Section 703(h) [42 U.S.C. § 2000e-2(h)] under the decision of this Court in *Teamsters v. United States*, 431 U.S. 324 (1975). The plaintiffs agreed that

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[1] International Association of Machinists and Aerospace Workers and Local Lodge 359; Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and Local 583; International Molders and Allied Workers Union and Local 342; Patternmakers League of North America and Patternmakers Association of Birmingham; and United Steelworkers of America and Local 2140. App. B (3b, note 2).

they would not seek back pay from the Steelworkers Unions unless evidence introduced by the defendants demonstrated Steelworker liability. App. B, 2b-7b.

Relying upon this Court's decision in *Teamsters*,[2] the District Court found that, while the collective bargaining units and resulting seniority systems had their origin in a discriminatory employment structure in 1940 and earlier, that fact did not establish a causative relationship between racial discrimination and the seniority systems. App. B, 20b, 21b. The Trial Court found that the seniority systems were racially neutral (App. B, 13b-15b); that, with the exception of a 1950 transfer of employees between bargaining units in which the national unions did not participate, (discussed *infra*), the collective bargaining units were rational and in accord with industry practice (App. B, 15b-20b); that the seniority systems were bona fide, with the exception of the 1950 transfer of employees, (App. B, 25b) and were not established or maintained for discriminatory purposes and that the Unions' post-Act failure to revise the seniority system was not discriminatorily motivated (App. B, 21b-24b). The Trial Court also held that the burden of proof under Section 703(h) rested upon the unions (App. B, 13b) but found that the unions carried that burden (App. B, 25b); and it held [3] that consideration of the numerical impact of the seniority systems was virtually foreclosed by *Teamsters* where on similar facts this Court held that the seniority system was neutral [4] (App. B, 14b).

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[2] *Teamsters Union v. United States*, 431 U.S. 324 (1975).

[3] In this ruling the Court referred to the earlier decision of the Fifth Circuit in *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976).

[4] 431 U.S., at 352-355.

The District Court entered decision in favor of the national unions and all local unions, except Machinists Local Lodge 359 and Boilermakers Local 583 which had participated in the 1950 transfer of employees. These locals were held liable to employees affected by the 1950 transfers. App. B, 24b-27b. The District Court entered a Rule 54(b) certificate (App. J, 1j) that there was no just reason for delay and directed entry of final judgment in favor of all Unions, except Locals 359 and 583, and final judgment was entered (App. K, 1k) from which plaintiff appealed.

An Order dismissing all claims against Machinists Local Lodge 359 and Boilermakers Local 583, except those arising from the 1950 transfer of employees, was entered (App. L, 1l) and the District Court issued a certificate pursuant to 28 U.S.C. § 1292(b) that the legality of the seniority system involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. App. M, 1m. Plaintiffs' application for permission to appeal was granted by the Fifth Circuit.

B. The Seniority Systems

The history of the collective bargaining units at the Bessemer Plant of U.S. Pipe is recited in *United States Pipe and Foundry Company*, 19 NLRB 1016, 1021 (App. F, 9f):

> Prior to 1934 the P.M.A. [Patternmakers], the I.A.M. [Machinists], and the I.M.U. [Molders] had represented the patternmakers, machinists, and molders, respectively, employed by the Company, and these three organizations had negotiated with the Company on behalf of such employees, with regard to

grievances, wages, hours and other working conditions. No contracts resulted from these negotiations. In 1934 the Company negotiated with an A.F. of L. federal labor union, which embraced employees other than those within the jurisdiction of the three organizations above mentioned. As a result of the 1934 negotiations, the Company promulgated certain working rules and regulations applicable to all employees. In 1935 the federal labor union had been absorbed by the I.M.U., which in 1934 had extended its jurisdiction to include all workers employed in the production of castings. The 1934 rules and regulations were, in substance, renewed by the Company in 1935 and 1936, after negotiations with a committee of employees and representatives of the P.M.A., the I.A.M., and the I.M.U. None of the foregoing negotiations resulted in a contract nor was any union formally recognized as the representative of any employees.

Following negotiations of the five A.F. of L. unions [including Boilermakers and Electricians], the Company entered into an agreement of April 14, 1938, referred to above, recognizing each union as collective bargaining representative of its members employed at the Bessemer plant.

In 1939 the Steelworker Unions [by predecessor Steelworker Organizing Committee] petitioned the NLRB for an election in a single bargaining unit comprised of all production and maintenance employees. The other unions intervened. The Molders sought a unit of all craft molders and all other production employees excluding those represented by the other craft unions. The other craft unions sought units comprised of craft and related employees. The NLRB held a self-determination election and ultimately certified the craft unions except the Molders to represent their crafts and related employees and the Steelworkers to represent all other employees.[5] All of these

[5] 19 NLRB 1016 at 1024, 1025, App. F, 14f-17f; 21 NLRB 671 at 674-676, App. G, 6g-9g.

events occurred prior to the recollection of witnesses and the Board's decisions recite virtually all of the facts of record. The Board (and the District Court) found that the Machinists did not admit black members in 1939 and the District Court found that in 1939 the Boilermakers placed black members in auxiliary locals; but the Board and the District Court found that both unions were willing, and sought, to represent black employees.[6]

In 1949, following enactment of the Taft-Hartley Act, which mandated the Labor Board to permit the establishment of craft bargaining units,[7] the Board held an election and certified the Molders as the representative of the employees in that craft. App. H, 1h-5h.

The District Court properly found that the establishment of these collective bargaining units and the structuring of seniority units along bargaining unit lines was in accordance with the policy and practice of the Board and of industry and that they were rational. App. B, 16b, 17b.

The seniority systems negotiated by all of the unions, including the Steelworkers, were substantially identical and conformed to the pre-existing operational units of

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[6] 19 NLRB, at 1020, App. F, 7f; 22 FEP cases, at 1700, 1701 (App. B, 16b). Notwithstanding these findings of the Board and District Court, there was testimony at the District Court trial that the Machinists Local Lodge had black members who attended union meetings in 1937 and had a black officer prior to World War II (June, 1979, transcript, pp. 212, et seq.; 217-219, 228-9, 232); and that the Boilermakers Local had black members as early as 1944 and a black officer in 1955 (June, 1959, transcript, pp. 301-2). There was no evidence or claim that any union practiced segregation or racial discrimination post-Act.

[7] 29 U.S.C. § 159(b)(2).

employees which had been established by U.S. Pipe. This resulted in the Steelworkers having 24 seniority units, the Machinists had 5 units, and the other four unions each had one seniority unit. App. B, 8b, 9b.

In all of these units, including those of the Steelworkers, seniority for purposes of promotion, layoff and recall was based upon continuous service within each seniority unit. The Steelworkers and IAM contracts permitted employees who transferred to another seniority unit represented by those unions, respectively, to retain seniority in his old unit in event of layoff until recall to the new unit, at which time an election between the two units would have to be made. App. B, 9b.

The District Court, while placing the burden of proof of Section 703(h) immunity upon the unions (App. B, 13b), found that the seniority systems were racially neutral, and had been applied in a uniform manner. App. B, 14b. While acknowledging that the racial job structure established by the Company necessarily entered into the original NLRB elections, the District Court found that the structuring of the representational units was rational and in accord with NLRB precedents and industry practice. App. B, 16b-18b. The Court also found that the seniority system adopted and maintained from 1940 until 1971 by the predominantly black Steelworkers was essentially identical to the systems adopted by the predominantly white craft unions and that in each instance the systems were adopted for other than racial reasons. App. B, 21b, 22b.

In 1940 the NLRB included helpers (black and white) in the bargaining units of employees, both craft and Steelworker, with whom they worked. Helpers included crane hookers working in the craft departments whereas the

skilled crane operators, including those assigned to the craft departments, were placed in the Steelworkers bargaining unit. As time passed, crane hookers in the craft bargaining units had no opportunity to promote to crane operator vacancies in the Steelworkers bargaining unit. Additionally, U.S. Pipe retained the unilateral right to select and hire persons for craft apprentice and trainee positions and by practice selected only white helpers for such opportunities.

As a consequence by 1950 black helpers working in the craft departments were dissatisfied with their promotional opportunities and had joined the Steelworkers Union and were pressing U.S. Pipe to transfer them to the Steelworkers bargaining unit. Additionally some white crane and machine operators and white helpers assigned by the NLRB to the Steelworkers bargaining unit but working with craft employees had joined the craft unions and desired to be transferred into the craft bargaining units.

In October, 1950, these pressures resulted in U.S. Pipe proposing a transfer of these employees between bargaining units and the three local unions affected (Steelworkers, Machinists and Boilermakers) agreed to the transfers desired by the employees. Appendix I, 1i-4i.

This transfer of employees was not a change in the seniority system, but it clearly was attended by racial considerations and affected the seniority expectancies of the employees concerned.[8] While the decision of this Court in *United Air Lines v. Evans*, 431 U.S. 553 (1977) appears to bar the actionability of this event, the District Court

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[8] At the time, in 1950, the transfer was desired by the employees concerned and was designed to improve the job opportunities afforded to them by the job practices of U.S. Pipe. See App. I, 1i-4i.

held that the event gave rise to liability to the employees transferred by the local unions who participated in the transfer. App. B, 22b, 25b, 26b.

In 1968, 1971, 1974-1975, and 1977, contract negotiations the Company suggested that the unions agree to amend the seniority systems to provide plantwide seniority. In 1971 the Steelworkers and the Machinists adopted limited intra-bargaining unit seniority carry over and in 1975 and 1977 all of the unions agreed to interunit seniority carry over but with first preference on vacant jobs being given to employees in the seniority unit where the vacancy occurred. Agreement on broad seniority carry over was not reached until just prior to the District Court trial. The District Court properly found from the evidence that the failure of agreement was not due to racial causes and noted that part of the reason for failure was a disagreement within the Steelworkers Union about seniority carry over rights. App. B, 10b, 22b, 23b.[9] While the predominantly black Steelworkers seniority system divided the employees it represented into 24 separate seniority units, the Steelworkers did not agree upon broad seniority carry over in its own bargaining units until the pre-trial settlement.

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[9] In 1971 and 1974 negotiations, the Steelworkers proposed that employees would have the right to bid on job vacancies across unit lines on the basis of seniority and minimum job ability. U.S. Pipe, on the other hand, insisted that seniority would control only if skill, ability and job knowledge (in the Company's opinion) were substantially equal. The Steelworkers were afraid that the Company requirements would enable the more skilled employees, both from within the Steelworker's bargaining unit and from the craft units, to bid from one preferred job to another, thereby by-passing senior employees. June 1979, transcript, pp. 118-124, 260.

In conclusion the District Court found that the seniority systems, with the exception of the 1950 transfers, were bona fide and had not been negotiated or maintained with discriminatory intent. App. B, 25b. In so ruling, the District Court held that the fact that the seniority systems had an adverse impact (lock-in effect) numerically upon more black employees than white employees did not compel a conclusion that the systems were not racially neutral (App. B, 14b, 15b); and held that the fact that the seniority systems had their genesis in a pre-Act discriminatory employment environment did not compel a conclusion that the seniority systems were caused by that fact or that they were discriminatorily motivated (App. B, 20b, 21b).

C. Court of Appeals Decision

Relying upon the third of the four factors for measuring the immunity of a seniority system under Section 703(h) enunciated in *James v. Stockholm Valves*, 559 F.2d 310, 352 (CA5, 1977) cert. den. 434 U.S. 1034, the Fifth Circuit held that the seniority systems had their "genesis in purposeful racial discrimination" because they "arose in an era of overt racial discrimination at U.S. Pipe." [10] The Court held that it had already decided in *Swint v. Pullman-Standard*, 624 F.2d 525 (CA 5, 1980) and *United States v. Georgia Power Co.*, 634 F.2d 929 (CA5, 1981) that immunity under 703(h) would not be extended to any seniority system which had its origin in a segregated pre-Act employment structure, which obviated the necessity for finding "purposeful discrimination in connection with the establishment . . . of the system;" because in

[10] The seniority systems, discussed *supra*, originated in the collective bargaining units established by the Labor Board decisions in 1940 and 1949. App. F, G & H.

such circumstances the Court finds "evidence of discriminatory intent under each of the *James* factors and the totality of all circumstances." App. A, 17a, 18a.[11]

The Court found that the District Court erred in holding that the Bessemer seniority systems were negotiated and maintained free of discriminatory purposes because "we again face a situation in which

> "the seniority system negotiated through the collective bargaining process tracked and reinforced the purposefully segregated job classification scheme maintained by the company [pre-Act] and the conclusion is inescapable that the seniority system itself shared that same unlawful purpose . . ." (App. A, 18a.)

The Fifth Circuit further held that the transfer of employees between bargaining units in 1950, in which U.S. Pipe and the Steelworker, Machinist, and Boilermaker local unions participated, manifested racial discrimination and infected the entire seniority systems with illegality,[12] so that the petitioner national unions were responsible therefor and that the District Court had erred in confining liability for that event to the participating local unions. App. A, 18a.

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[11] Certiorari has been granted in *Swint*, No. 80-1193. Petition for a writ of certiorari is pending in *Georgia Power*, No. 80-2117. While, in this case, the Fifth Circuit did not expressly rely upon *East v. Romine, Inc.*, 518 F2d 332, 339 (CA 5, 1975) in which it held that "discrimination *vel non*" is an ultimate fact which may be determined by the appellate court free of the clearly erroneous standard of FRCP 52(a), the Court's reliance upon *Swint* which did invoke the rule of *East v. Romine* and upon "the totality of circumstances" make it apparent that in this case the Fifth Circuit reached its conclusions even though the District Court's findings were authorized by the evidence.

[12] A similar holding was made in *Swint*, as to which certiorari has been granted. Note 11, *supra*.

The Fifth Circuit also ruled, contrary to the command of *Teamsters* and this Court's construction of the Congressional intent manifested in Section 703(h), that disparate impact of a seniority system, resulting from the employer's pre-Act hiring and job assignment practices, "constitutes not only relevant evidence of discriminatory purpose" but can conclusively resolve the racial "equality" factor against the seniority system, contrary to the findings of the District Court (App. A, 19a) and thereby held contrary to *Teamsters* that the "lock-in" effects of a seniority system compel the conclusion that the seniority system has a "discriminatory purpose." (App. A, 14a, 19a.)

Finally, the Fifth Circuit found that the Steelworkers Unions had appealed from the decision of the District Court in favor of those Unions, when in fact such an appeal was, and is, non-existent. But the Fifth Circuit went further and decided the hypothetical issue arising from that non-existent appeal in favor of the Steelworker Unions. App. A, 8a, 9a, 21a, 24a, 25a. In deciding this imaginary appeal the Court found, contrary to the evidence relied upon by the District Court and contrary to the District Court's findings, that the Steelworker Unions had taken "every reasonable step to bring about plant-wide seniority". App. A, 24a.

The conclusions of the Fifth Circuit concerning the Steelworkers Union are in strange contrast to its findings concerning those same unions in *Swint*, now before this Court for review in No. 80-1193. Those findings would be immaterial to this petition were it not for the conclusions of the Fifth Circuit in this case (1) that one union has the duty to negotiate amendments to the seniority system in a collective bargaining unit represented by another

union and (2) that, contrary to *Teamsters*, a duty to amend a seniority system arises from knowledge that the seniority system has a disparate impact (perpetuates pre-Act discrimination by the employer), even though, as found by the District Court, the seniority system by *Teamster* tenets is bona fide and legal.

In conclusion, the Court of Appeals held that the seniority systems of petitioner were not bona fide because the record clearly demonstrates discriminatory purposes underlying the creation and maintenance of the systems, but that the substantially identical systems of the Steelworkers Union were bona fide because the Steelworker Unions took every reasonable effort to eradicate discrimination. App. A, 31a.

The decision of the Court of Appeals was based upon its holdings, recited *supra*, that all seniority systems which originated pre-Act in a discriminatory employment environment and which perpetuate the effects of pre-Act discrimination necessarily have a discriminatory purpose and intent.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Decisions Of This Court And Of Other Circuits

Section 703(h) of Title VII provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . 42 U.S.C. § 2000e-2(h).

In *Teamsters v. United States*, the seniority system had its genesis in a discriminatory employment structure created pre-Act by the employer [13] and the system perpetuated post-Act the impact of that discrimination upon black employees.[14] Notwithstanding these facts, it was not considered in *Teamsters* that the seniority system had its genesis in racial discrimination or had been maintained with illegal purpose and this Court held that the system was *bona fide* because it applied equally to all racial groups.[15] This Court held that Section 703(h) protects bona fide seniority systems even if they perpetuate the effects of prior intentional discrimination by the employer. 431 U.S. at 349-54. In so holding, the Court rejected the contention that a seniority system which perpetuated prior discrimination could not be bona fide, stating that, "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54.[16]

The reason for this conclusion, the Court said, was that:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination . . . the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and

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[13] 431 U.S. 324, 342, 343 (1977).

[14] 431 U.S. at 344, 345.

[15] 431 U.S. at 355, 356.

[16] Similarly, in *Trans-World Airlines, Inc. v. Hardison*, the Court stated: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." 432 U.S. 63, 82 (1977).

> thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. 431 U.S. at 352, 353.

It is implicit in the *Teamsters* decision that the origin of a seniority system in a discriminatory employment environment in pre-Act times does not constitute "genesis in racial discrimination" and that continuation of the system with knowledge that it tends to perpetuate the effects of pre-Act discrimination does not show that it has been "negotiated" or "maintained" for illegal purposes. 431 U.S. at 356.

Indeed, if such were not the case *all* seniority systems which have their origin in pre-Act times would be illegal [17] and the purpose of Congress in enacting Section 703(h) would be totally negated.

And yet that is exactly what the Fifth Circuit has decreed in this case by holding that the seniority system "had its genesis in purposeful racial discrimination" because:

> . . . the system arose in an era of overt racial discrimination at U.S. Pipe, when blacks were assigned to "dead-end" jobs, bargaining seniority units were defined by racial considerations, and seniority provisions allowed transfer to better units only through commission of "seniority suicide". See our refusal to extend section 703(h) immunity to similar seniority systems in *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), and *United States v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981). We need not decide

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[17] As the District Court noted, virtually all industrial environments were discriminatory in the 1940's and 50's. (App. B, 20b.) In fact until after the enactment of Title VII in 1964, the Fifth Circuit itself had only one black employee—a porter of all work.

whether the court's specific finding of the racial genesis of the Bessemer system is tantamount to a finding of "purposeful discrimination in connection with the establishment . . . of the system," *James*, 559 F.2d at 351, because here, as in *Swint* and *Georgia Power*, we find evidence of discriminatory intent under each of the *James* factors and the totality of all circumstances. App. A, 17a, 18a.

* * *

The disparate impact of the Bessemer seniority system on black employees is obvious and well documented by the record. The district court recognized this disparate impact but concluded that it was irrelevant. We have since held that disparate impact constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the "equality" factor in favor of those who have suffered such discrimination. See *Georgia Power*. As for the district court's reliance upon the facial equality with which the Bessemer system operated, we merely note that here again "facial equality . . . was but a mask for the gross inequality beneath." *Georgia Power*, 634 F.2d at 935. App. A, 19a.

Thus, the Fifth Circuit cancels this Court's decision in *Teamsters* by holding that the seniority system, found by the District Court in this case to be *bona fide* and neutral [18] [App. B, pp. 13b-25b], is discriminatory without

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[18] *Bona fide* means "neutral, legitimate". *Teamsters*, 431 U.S. at 353, 355. In *United Air Lines v. McMann*, 434 U.S. 192, 197 and note 5 (1977), this Court approved the rulings of the Fifth and other circuits that a bona fide seniority system is one which is "genuine" or "authentic" and not a subterfuge. See *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 217 (CA 5, 1974); *DeLoraine v. MEBA Pension Trust*, 499 F.2d 49 (CA-2) cert. den. 419 U.S. 1009 (1974); *Steiner v. National League of Prof. Baseball Clubs*, 377 F. Supp. 945, 948 (D.C. Cal. 1974) aff'd. CA-9, October 15, 1975.

other evidence of discriminatory purpose and intent because it originated in a pre-Act discriminatory environment and because it adversely impacts black employees by perpetuating pre-Act discrimination of the employer.

In such decision the Fifth Circuit also ignores the holdings of this Court in *Trans World Airlines v. Hardison*, 432 U.S. 63, 82 (1977), that a ruling that a seniority system is illegal without a showing of discriminatory purpose is "inconsistent with the dictates of § 703(h), both on its face and as interpreted in the recent decisions of this Court" and that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."

While this Court has not as yet defined the nature of evidence necessary in a Title VII case to show a discriminatory intent which will deprive a seniority system of the immunity afforded by Section 703(h), the decisions of this Court in *Teamsters* and *Hardison* make it apparent that mere evidence of racially disproportionate impact which perpetuates pre-Act discrimination and knowledge of that impact, as in this case, is insufficient. Other circuits, contrary to the Fifth Circuit, have held, as this Court held in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 259 (1979); that:

> "discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of,"

it's adverse effects upon an identifiable group.[19]

Such is the test of Section 703(h) immunity which, unlike the Fifth Circuit, the Fourth Circuit has adopted in Title VII seniority cases. *Carroll v. Steelworkers*, 23 FEP Cases 238, 248, *aff'd per curiam* No. 80-1412 (4th Cir. Dec. 2, 1980); *Patterson v. American Tobacco Co.*, 634 F.2d 744, 750 (4th Cir. 1980); *Younger v. Glamorgan Pipe and Foundry Co.*, 20 FEP Cases 776, 784 (C.D. Va. 1979), aff'd. 621 F.2d 96, 97 (4th Cir. 1980). The District of Columbia Circuit and the Sixth Circuit have indicated accord with the Fourth Circuit rule and tacit disagreement with the Fifth Circuit application. *U.S. v. Trucking Employers, Inc.*, 561 F.2d 313, 319 (D.C. Cir. 1977); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1378 (6th Cir. 1977).

Requiring proof of intent as they do, these cases reject the Fifth Circuit's resurrection of the pre-*Teamsters* rule, which was prevalent among the circuits, that all seniority systems which have a disparate impact because of pre-Act job assignments are *per se* illegal.

Most, if not all, seniority litigation under Title VII presents claims of disparate impact. Hence, defensive assertions—that the seniority systems are *bona fide* and immune under Section 703(h)—present claims that the seniority systems are genuinely and legitimately used for the lawful purpose of establishing and neutrally maintaining seniority rights. In other words, Section 703(h)

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[19] Similar rulings were made in *Washington v. Davis*, 426 U.S. 229, 238-244 (the disproportionate impact must be traced to a purpose to discriminate on the basis of race); and in *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (past discrimination cannot condemn action that is not itself illegal—proof of purposeful discrimination is necessary).

establishes a *bona fide* business purpose defense to claims that seniority systems impact disparately upon black employees who have been victims of pre-Act employer discrimination. Thus, the rules of proof (going forward with evidence) which have been established by this Court for the presentation of bona fide business purpose defenses in Title VII cases are applicable in seniority cases. *Cf.*, *Texas Department of Community Affairs v. Burdine*, 67 L.Ed 2d 207 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This accords with the implications of *Teamsters* and *Hardison* quoted *supra*, that the burden to prove a discriminatory purpose in a seniority system, which has been shown to be used for genuine, legitimate, neutral seniority purposes, rests upon the plaintiff.

However, both the District Court and the Fifth Circuit in the present case placed that burden upon the defendants. This procedural burden assumes a position of impossibility under the decisions of the Fifth Circuit in this case, *Swint* and *Georgia Power* and under the decision of the Fifth Circuit on remand in *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir., 1980), reversed, 68 L Ed.2d 290 (1981), on remand, 26 FEP Cases 1417 (5th Cir., Sept. 30, 1981). On remand the Fifth Circuit held in *Uncle Ben's* that the decisions of this Court in *Burdine*, *McDonnell Douglas* and *Waters* have no application in disparate impact (seniority) cases such as *Teamsters* and *James*. 26 FEP Cases at 1418.

Unless this Court reverses the decisions of the Fifth Circuit in this case, *Swint* and *Georgia Power*, the doctrine of *Teamsters* and the purpose Congress sought to attain by enacting Section 703(h) are at an end in the South (Fifth and Eleventh Circuits).

Subsidiary Rulings Requiring Review

1. The 1950 Transfer of Employees

The 1950 transfer of employees, while clearly attended by racial considerations, was made to improve the job expectations of the employees involved and to accord with their wishes. The transfer was not illegal in 1950, almost 15 years before enactment of Title VII. Nevertheless, the District Court held that it was not shown that modification of Board certified units accorded with industdustry practice [20] and was actionable as against the participating local unions, but not the international unions. The Fifth Circuit, notwithstanding the beneficent motives with which the transfer was attended and its legality in 1950, seized upon the transfer as proof that the entire seniority systems were illegally motivated and that the international unions were also liable. App. A, 18a.

In *Franks v. Bowman*, 424 U.S. 747, 762 (1976), in *Teamsters*, 431 U.S. at 356, 351, and in *United Air Lines*

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[20] Present counsel for the unions did not participate in the District Court proceedings and cannot answer as to why legal precedents for the transfer were not shown; however, NLRB Rules provide for such modifications and for Board determinations in event the parties are unable to agree upon modifications in collective bargaining units required by changes in employee communities of interest and by changes in industrial circumstances. Rules of National Labor Relations Board, Section 102.60(h); 29 FR 15918. Changes in collective bargaining units may be made by agreement of the parties or, absent agreement, by the Board. Both methods have equal efficacy. *Airborne Freight Corp.*, 142 NLRB 873 (1963); *Water Tower Inn*, 139 NLRB 842 (1962); *General Cable Corp.*, 139 NLRB 1123 (1962). This Court has recognized that acts of parties, legal when they occurred, long before a prohibitive statute is enacted, do not show illegal intent. *United Air Lines v. McMann*, 434 U.S. 192, 197-198 (1977).

v. Evans, 431 U.S. 553, 558-560, this Court held that relief under Title VII could not be predicated upon acts which occurred before the enactment of the statute. In *Evans*, the Court said:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . it is merely an unfortuante event which has no present legal consequences. 431 U.S. at 558.
>
> * * *
>
> . . . a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit. . . . Such a result would contravene the mandate of § 703(h). 431 U.S. at 559, 560.

The transfer of employees between bargaining units in 1950 was not a modification of the seniority systems even though it may have affected and improved the promotional and seniority expectations of the employees concerned. The transfer does not show intent to deprive employees of then non-existent statutory rights but was an attempt to improve the lot of employees under the employment practices existing at that time, which were not illegal in 1950.

The critical question then is: May a legal event occurring 14 and more years before the statute was passed be used 30 years later as a determinant of hidden illegal intent in a genuine, legitimate, neutral seniority system; or was the transfer "an unfortunate event which has no present legal consequences."

The answer is evident. Congress did not intend that union members of this generation should pay reparations for the amoral but not illegal acts of a prior generation;

and such is not equitable. The holdings that the transfer, which occurred nearly fifteen years before the statute was enacted, was a violation of the Act contravenes this Court's decisions in *Bowman*, *Teamsters* and *Evans*. The holdings also conflict with decisions of the Second and Fourth Circuit which give heed to the teachings of *Evans*, quoted above. *Cf.*, *Cates v. Trans World Airlines*, 561 F.2d 1064, 1072 (2nd Cir., 1977); *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625, 644 (4th Cir., 1978). To hold otherwise destroys the purpose of Section 703(h).

2. Failure to Amend the Seniority Systems

The District Court found and concluded under *Teamsters* tenets and valid evidence that the seniority systems were *bona fide* and neutral and had not been negotiated or maintained for discriminatory purposes.

If the District Court's findings and conclusions were authorized by the evidence—and they were—there was no duty to amend or alter the seniority systems because

> Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights even at the expense of pre-Act discriminatees. *Teamsters*, 431 U.S. at 354.

The Fifth Circuit's findings, contrary to those of the District Court, that Steelworkers espousal of amendment of the seniority systems was blocked solely by craft union opposition is as fanciful and devoid of supporting facts as is the Fifth Circuit's finding that the Steelworkers filed an appeal from the District Court's judgment in this case. The fact is that none of the Unions, including the Steelworkers, fully supported broad amendment of the seniority systems; and the Court of Appeals did not reverse the District Court's specific finding, which was based on valid evidence, that the Steelworkers had an internal disagree-

ment concerning the desirability of such amendments. In fact, the Steelworkers did not amend their own seniority system prior to 1975 [21] other than to provide limited seniority carry over rights on opening level vacancies and in cases of lay-off. Similar provisions were adopted by the Machinists who also represented employees in multiple seniority units.

In finding a duty to amend the seniority system, the Fifth Circuit relied upon and resurrected its pre-*Teamsters* decision in *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir., 1974), an impact case. There and here the Fifth Circuit held that a union has a duty to seek amendments to another union's seniority system if it knows that that system has an adverse racial impact because of pre-Act job assignments. That decision ignores the fact that it is an unfair labor practice for one union to attempt to bargain with respect to the bargaining unit represented by another union [22] and fails to give interplay to the conflicting duties arising under two different statutes. *Cf.*, *Emporium Capwell Co. v. Community Organization*, 420 U.S. 50, 70 (1975).

II. The Decision Below Does Not Comport With Proper Standards Of Judicial Discipline In Its Failure To Observe FRCP 52(a).

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to

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[21] All unions adopted carryover of plantwide seniority on filling vacancies, but with "unit preference", in their 1975 and 1977 contracts.

[22] Texlite, Inc., 119 NLRB 1792 (1958), enforced 266 F2d 349 (5th Cir., 1959); *Central Soya Co.*, 142 NLRB 930 (1963).

> the opportunity of the trial court to judge of the credibility of the witnesses. . . .

The District Court lived with this case for seven years through prolonged pretrial procedures and several pretrial conferences. App. B, pp. 3b-7b. The Court entered painstakingly detailed findings of fact on all issues in the case. The Court of Appeals did not address the specific findings of the District Court but adopted a series of broad characterizations of the record which do not reconcile with the specific findings of the District Court. Based upon policies predetermined in *Swint* and *Georgia Power*, the Court found discriminatory intent upon "the totality of all circumstances" which existed in pre-Act times. App. A, 18a, 20a.

While the Court did not in this case expressly rely upon *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir., 1975) in which it held that "discrimination *vel non*" is an ultimate fact which may be determined by the appellate court free of the clearly erroneous standard of Rule 52(a), the Court's reliance upon *Swint*, which did invoke the rule of *East v. Romine*, and upon the generality of "the totality of circumstances", make it apparent that the Court in this case supplanted the detailed findings of fact of the District Court with policies predetermined in *Swint* and *Georgia Power*.

In this case as in *Swint* and *Georgia Power*, this failure to observe the judicial discipline required by Rule 52(a) merits supervisory review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTES AND RULE INVOLVED

Section 703(a), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(c) provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an em-

ployee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(h) provides in pertinent part as follows:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . .

Section 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with

> the Commission. Interim earnings or amounts earnable with reasonable diligence by the persons or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 52(a), F.R.Civ.P., provides in pertinent part:

> . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

81-1029

No. _____

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CLERK

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; AND BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Petitioners,

v.

JOSEPH TERRELL, JR., WALTER DUDLEY, THOMAS GREEN, JOHNNY LONG, ALBERT MASON, MARCUS OAKES, SAM WALKER, ET AL.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~FIFTH CIRCUIT~~ ELEVENTH CIRCUIT

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APPENDIX A

[644 F.2d, at 1112]

Joseph TERRELL, Walter Dudley, Thomas Green, Johnny Long, Albert Mason, Marcus Oakes, Sam Walker, on behalf of themselves and the class they represent, Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO. et al., Defendants,

Local 2140, United Steelworkers Union Local 342, International Molders, Allied Workers Union, et al., Defendants-Appellees.

Joseph TERRELL, Jr., et al., Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO. et al., Defendants,

Local 2140, United Steelworkers Union, Defendant-Appellee.
Nos. 80-7107, 80-7256.

United States Court of Appeals,
Fifth Circuit.
Unit B
May 14, 1981.

Rehearing and Rehearing En Banc
Denied Aug. 7, 1981.

The United States District Court for the Northern District of Alabama at Birmingham, Sam C. Pointer, Jr., J., held that all but one aspect of a seniority system

[644 F.2d, at 1112]

was bona fide and that charges filed with the Equal Employment Opportunity Commission in 1969 failed to name as respondents international unions. The Court also refused to excuse one union from legal responsibility for the seniority system. On appeal and cross appeal, the Court of Appeals, Hatchett, Circuit Judge, held that: (1) record clearly demonstrated racially discriminatory purposes underlying the creation and maintenance of the seniority system, which thus was not bona fide; (2) record demonstrated that one union had taken every reasonable step to eradicate such discriminatory system and thus was excluded from liability for the system; and (3) allegations in 1969 charges before the Equal Employment Opportunity Commission did not clearly implicate the international unions and thus their liability would not commence until 180 days prior to 1973 amended charges.

Affirmed in part, reversed in part, and remanded.

1. Civil Rights 9.12

For seniority system to be bona fide, it must not have been created or maintained with intention to discriminate. Civil Rights Act of 1964, §§ 703, 703(h) as amended 42 U.S.C.A. §§ 2000e−2, 2000e−2(h).

2. Civil Rights 9.12

Court in determining whether particular seniority system stems from nondiscriminatory motivations should determine whether system operates to discourage all employees equally from transferring between seniority units, whether seniority units are in same or separate bargaining units, and, if the latter, whether structure is rational and in conformance with industry practice, whether system had its genesis in racial discrimination and whether

system was negotiated and has been maintained free from any illegal purpose. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e−2(h); 42 U.S.C.A. § 1981.

3. Civil Rights 9.12

Immunity created by equal employment opportunity provision of Civil Rights Act of 1964 for certain seniority systems extends to systems with disparate racial impact only when differences in treatment are not result of intention to discriminate because of race. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e−2(h); 42 U.S.C.A. § 1981.

4. Civil Rights 44(1)

District court in equal employment opportunity suit correctly found, on evidence, that seniority system had its genesis in purposeful racial discrimination, but erred in concluding that system was negotiated and maintained free of discriminatory purposes. Civil Rights Act of 1964, § 703(h) as amend- [644 F.2d, at 1113] ed 42 U.S.C.A. § 2000e–2(h); 42 U.S.C.A. § 1981.

5. Civil Rights 9.12

Disparate impact of seniority system on black employees was not only relevant evidence of discriminatory purpose but could conclusively resolve "equality" factor in favor of those suffering such discrimination, and system was not saved by facial equality. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e–2(h); 42 U.S.C.A. § 1981.

[644 F.2d, at 1113]

6. Civil Rights 9.12

One factor which could be considered in determining purposes underlying seniority system was overly discriminatory policy of each of craft unions at time when seniority system was created and "corrected" to follow racial lines, and such policies were strong additional evidence of racial motivations underlying system defended by craft unions in face of mounting opposition by company and other union. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e–2(h); 42 U.S.C.A. § 1981.

7. Civil Rights 9.10

One reason for caution in excusing party involved in unlawful employment practice stems from congressional purpose of stimulating self-corrective action by employers and unions. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e–2(h); 42 U.S.C.A. § 1981.

8. Civil Rights 39

Whether party involved in established equal employment opportunity violation may be excused from liability turns upon whether that party has proved to full satisfaction of courts that it has taken every reasonable step to bring employment practices into compliance with law, and even union which signs contract establishing unlawful seniority system may suffer no liability if it actively opposed adoption of the system. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e–2(h).

9. Civil Rights 39

On record, particular labor union, local lodge of which was consistently represented by black officials, diligently sought to bring about nondiscriminatory, plantwide sys-

tem and had taken every reasonable step to oppose seniority system which operated primarily to discriminate against its own members, and consequently was not liable under equal employment opportunity provisions of Civil Rights Act of 1964. Civil Rights Act of 1964, § 703(c), (c)(3) as amended 42 U.S.C.A. § 2000e–2(c), (c)(3).

10. Civil Rights 32(3)

Only parties previously identified as respondents in charges filed with Equal Employment Opportunity Commission were subject to subsequent liability under equal employment opportunity provisions of Civil Rights Act of 1964. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e–5(f)(1); 42 U.S.C.A. § 1981.

11. Civil Rights 34

Remedial purposes of equal employment opportunity provisions of Civil Rights Act of 1964 and paucity of legal training among those whom it is designed to protect require that court construe Equal Employment Opportunity Commission charge with utmost liberality. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e–5(f)(1); 42 U.S.C.A. § 1981.

12. Civil Rights 34

Court called upon to interpret charge before Equal Employment Opportunity Commission must bear in mind that fundamental purpose of charge is to trigger investigation by Commission, and necessity for equally broad interpretation of such charge at administrative and judicial levels stems from framework of Title VII and its goal of encouraging voluntary compliance through EEOC con-

[644 F.2d, at 1113-4]

ciliation. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e–5(f)(1); 42 U.S.C.A. § 1981.

13. Civil Rights 34

Reasonable limits of investigation potentially triggered by equal employment opportunity charge define not only substantive limits of subsequent Title VII action but also parties potentially liable in that action. Civil Rights Act of 1964, § 706(e) as [644 F.2d, at 1114] amended 42 U.S.C.A. § 2000e–5(f)(1); 42 U.S.C.A. § 1981.

14. Civil Rights 34

Where charges filed with Equal Employment Opportunity Commission failed to allege specific conduct clearly implicating international unions and Commission then quite reasonably omitted such unions in its investigative and conciliatory efforts and such unions thus failed even to receive informal notice that they had been named through Commission's administrative processes, no liability of such international unions under Title VII was to commence until 180 days prior to amended charges. Civil Rights Act of 1964, §§ 701 et seq., 703(h), 706(e) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e–2(h), 2000e–5(f)(1).

Demetruis C. Newton, Birmingham, Ala., Barry L. Goldstein, NAACP Legal Defense & Education Fund, Inc., Washington, D.C., Jack Greenberg, New York City, for plaintiffs-appellants in both cases.

Joseph P. Hudson, Gulfport, Miss., Daniel B. Edelman, Washington, D.C., for plaintiffs-appellants in 80–7107.

Lutz Alecander Prager, Paul E. Mirengoff, Warren Duplinsky, Gen. Counsels, EEOC, Washington, D.C., for amicus curiae in both cases.

Bredoff, Barr, Gottesman, Cohen & Peer, Michael H. Gottesman, Washington, D.C., for Patternmakers League of North America, and United Steelworkers of America.

Thomas F. Phalen, Jr., Gen. Counsel, Washington, D.C., for Int. Molders & Allied Workers Union & Local 342.

J. R. Goldthwaite, Jr., Atlanta, Ga., for Internat'l Assoc. of Machinist of Aerospace, Etc. & Boilermakers.

N. Daniel Rogers, Donald H. Brockway, Jr., Birmingham, Ala., for Local Union 136.

Appeals from the United States District Court for the Northern District of Alabama.

Before FAY and HATCHETT, Circuit Judges, and GROOMS*, District Judge.

HATCHETT, Circuit Judge:

This appeal stems from a class action employment discrimination suit brought in 1972 under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e–2(e), and section 1981 of the 1866 Civil Rights Act, 42 U.S.C. § 1981, by black employees at the Bessemer, Alabama plant of U.S. Pipe and Foundry Company against their employer and their union representatives.[1] Due to pretrial settlements by the company and the electrical workers union,

*District Judge of the Northern District of Alabama, sitting by designation.

[1] This is a consolidated interlocutory appeal under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 54(b).

[644 F.2d, at 1114-5]

along with the agreement of all parties to a form of injunctive relief and the postponement of trial on the allocation of any back pay liability, this litigation now focuses upon the alleged illegality of the Bessemer seniority system and any resulting liability on the part of five unions. These unions include one industrial union, the United Steelworkers of America (Steelworkers), Local 2140, and four craft unions: The Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers (Boilermakers), Local 583; the International Association of Machinists & Aerospace Workers (Machinists), Lodge 359; the International Molders & Allied Workers Union (Molders), Local 342; and the Pattern Makers League of North America (Patternmakers), Birmingham Association.

Appellants, the class of black employees, challenge the decision of the trial court that all but one aspect of the Bessemer seniority system was bona fide within the meaning of § 703(h) of Title VII and thus immunized from attack as a seniority system whose discriminatory effects were unintended. *See* 42 U.S.C. § 2000e–2(h). In addition, appellants challenge the court's procedural ruling that their charges filed with the EEOC in 1969 failed to name as respondents the international unions at the plant so as to permit any Title VII liability on [644 F.2d, at 1115] their part to commence 180 days prior to the filing of these charges. *See* 42 U.S.C. § 2000e–5(f)(1). One of the appellees, the Steelworkers, cross-appeals the refusal of the district court to excuse them from legal responsibility for the seniority system on the separate ground that this predominately black, industrial union actively opposed the largely white, craft unions in the establishment of a seniority system which worked to the disproportion-

ate disadvantage of the Steelworkers. *See* 42 U.S.C. § 2000e–2(c)(3).

We agree with two of these three challenges. We hold that the seniority system at Bessemer was not bona fide under § 703(h), that the Steelworkers bear no legal responsibility for this discriminatory seniority system, but that the Internationals were insufficiently identified by the 1969 EEOC charges to trigger their Title VII liability at that time.

FACTUAL BACKGROUND

U.S. Pipe Co. has a plant in Bessemer, Alabama which manufactures pipe for water and sewage projects. Production and maintenance workers at the plant have elected as their bargaining representatives various craft unions associated with the American Federation of Labor, as well as the non-craft steelworkers union affiliated with the Congress of Industrial Organizations. The district court found that the craft unions represent workers in the higher-skilled, better-paying jobs from which employees have the opportunity to move up in the company. The Steelworkers union represents workers in the least desirable, "dead-end" jobs. The craft unions are virtually all white. The Steelworkers union is predominately black.

The district court also found that the racial division between the unions stems partly from the company's historical practice of making job assignments on the basis of race. Discriminatory job assignments reflected the general racism which permeated all aspects of plant operations prior to 1965, from the segregation of employee facilities to the prevention of equal employment opportunities.

[644 F.2d, at 1115]

After passage of the 1964 Civil Rights Act, a major cause of continuing inequality was the seniority system in effect at the Bessemer plant until 1975. The overall seniority system was a composite of separate bargaining agreements negotiated by the company with each union. These agreements were similar, however, in providing that seniority would be measured on the basis of length of service in the applicable seniority unit, with seniority units generally defined by the bargaining units. With few exceptions, an employee who transferred to a new unit received no credit for service to the company in his prior unit. As recognized by the district court, this inhibition upon transfers disproportionately prejudiced those workers in the predominately black Steelworkers union who had been assigned to the least desirable, "dead-end" jobs. The appellants describe the discouraging effect of this system upon black advancement at the plant by pointing to the fate of one black employee who did transfer into a craft unit, losing twenty-six years of plant seniority, only to then lose his job completely as part of a reduction in plant employees which left on the job two white workers with just a few years of seniority in the craft unit. See our recent decisions in *U.S. v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), and *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), for descriptions of the discriminatory operation of seniority systems with "lock-in" provisions such as those at the Bessemer plant.

In the early years of plant operations, various craft unions attempted with little success to represent employees in negotiating a collective bargaining agreement. In 1939, six international unions competed strenuously to represent some or all of the employees at the plant. The

[644 F.2d, at 1115-6]

Steelworkers associated with the CIO, sought to represent all production and maintenance employees at the plant. Four unions affiliated with the AFL sought to represent employees based primarily upon their craft: the Boilermakers, Machinists, Patternmakers, and Electrical Workers. One other AFL [644 F.2d, at 1116] union, the Molders, claimed not only those employees skilled in that craft, but all other production and maintenance employees except those claimed by the other AFL unions.

Elections supervised by the NLRB resolved this confrontation between the newly formed CIO, with its strategy of heterogeneous, plant-wide industrial organization, and the older AFL, with its traditional approach of organizing separate, homogeneous craft unions. The Boilermakers, Machinists, Patternmakers, and Electrical Workers prevailed over the Steelworkers among these largely white craft employees. The Steelworkers defeated the Molders among the remaining, predominately black group of employees. "That the elections had racial implications cannot be doubted," according to the district court.

Passage of the Taft-Hartley Act enabled the Molders to return to the Bessemer plant in 1949 to attempt "craft severance" from the industrial union represented by the Steelworkers. *See* 29 U.S.C. § 159(b)(2). Following an NLRB election among the all white employees with molder skills, the Molders union was certified as a separate craft unit.

In 1950, the unions formalized existing practices, without the sanction of the NLRB, by switching representation of thirteen positions from one unit to another. Ten jobs given to the Boilermakers and Machinists by the Steelworkers were staffed by white workers. Three posi-

[644 F.2d, at 1116]

tions given to the Steelworkers by the two craft unions were staffed by black workers. Though it continued to represent some white employees, the Steelworkers represented an even higher percentage of black workers as a result of this "swap." The Boilermakers and Machinists joined the Patternmakers and the Electrical Workers in having all white memberships.

The bargaining units at Bessemer retained this racially divided structure until the time appellants filed discrimination charges with the EEOC in 1969. In the period directly covered by this lawsuit, U.S. Pipe negotiated collective bargaining agreements with each of the unions in 1968, 1971, and 1974. Prior to this time the Steelworkers had repeatedly advocated plant-wide seniority. Armed in 1968 with the recently enacted Civil Rights Act, the Steelworkers proposed plant-wide seniority on the first day of negotiations. The company expressed a willingness to make the requested changes, but noted the need for the approval of the other unions. The craft unions strongly disapproved of any change, and the "lock-in" provisions remained intact.

In 1971, the company initiated the proposal of plant-wide seniority. The Steelworkers met privately with the other unions several times in an effort to gain their agreement to such a system. Again the craft unions prevented any change.

In 1974, the Steelworkers met with the craft unions in advance of their separate negotiations with the company in order to advocate plant-wide seniority. The craft unions were intransigent. The Steelworkers then agreed to a united union proposal to the company for plant-wide seniority qualified by a "unit preference" scheme which

gave unit members priority consideration for job vacancies. While the Steelworkers and the company continued to express their preference for a complete plant-wide seniority system, both agreed to the compromise proposal.

THE DISTRICT COURT DECISION

[1, 2] The district court upheld the validity of the seniority system except for the 1950 "swap" of positions between the Steelworkers and the Boilermakers and Machinists. The court correctly recognized that in order for a seniority system to be bona fide under § 703(h) of Title VII, it must not have been created or maintained with the intention to discriminate. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The district court properly looked to the four factors extracted by us from the Supreme Court's opinion in *Teamsters*, and set forth in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 [644 F.2d, at 1117] L.Ed.2d 781 (1978), to assist in determining whether a particular seniority system stems from nondiscriminatory motivations:

(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

(2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

(3) whether the seniority system had its genesis in racial discrimination; and

(4) whether the system was negotiated and has been

[644 F.2d, at 1117]

maintained free from any illegal purpose.

James, 559 F.2d at 352.

The district court found that one of the *James* factors weighed in favor of appellants: The seniority system had its genesis in racial discrimination. Specifically, the court found that racial considerations played a major role in the elections which produced the original bargaining and seniority units, and in the 1950 "swap" of employee positions between several units.

The district court ruled, however, that none of the other three *James* factors suggested an intent to discriminate through the Bessemer seniority system. Regarding the equality with which the system operated upon all employees, the court noted that the "lock-in" provisions were neutral on their face and as applied. The court acknowledged that "a much larger percentage of blacks than whites would have reason to desire transfer but for the loss of seniority under the rules," and that "the seniority system has been shown to have a discriminatory impact upon black employees." The court believed these facts to be irrelevant to the determination of any racially discriminatory intent.

The court also found general rationality in the Bessemer bargaining structure, and thus weighed this factor against a finding of discriminatory purpose. Though fraught with racial overtones, the original configuration of the units was deemed rational when viewed in light of the divisions in the labor movement at the time of the original elections. The court placed significance upon the fact that "notwithstanding discrimination against blacks within their own structures, the Boilermakers and Molders were nevertheless seeking to represent black employ-

ees. . . ." The court viewed the fact that the Molders later sought "craft severance" only among the all white employees in skilled positions, to the exclusion of their all black helpers, as fully justified by the NLRB practice of permitting such special elections only among skilled employees. The court recognized that the 1950 "swap" of jobs between unions was neither rational nor in conformity with industry practice. Yet the court treated this final change in the Bessemer bargaining structure as nothing more than an isolated incident which in no way implicated the overall seniority system.

The district court ruled that the final *James* factor, whether the seniority system was negotiated and maintained free from illegal purpose, again weighed in favor of the unions, with the exception of the craft unions involved in the 1950 "swap." The court inferred that the "lock-in" seniority provisions negotiated by all the unions, including the largely black Steelworkers union, reflected non-racial considerations. Craft union maintenance of this system was deemed an effort to prevent competition from other white unions rather than an effort to block encroachment by black workers. The court concluded that racial considerations played a role only in the 1968, 1971, and 1974 negotiations, and then only in the positive context of proposals to remove discriminatory practices.

On balance, the court held that the racially discriminatory genesis of the system provided insufficient evidence of an intent to discriminate through the creation and maintenance of the seniority system. Finding the seniority system bona fide under section 703, the court released all unions from liability under Title VII, with the exception of the Boilermakers and Machinists, whose

[644 F.2d, at 1117-8]

liability was limited to the 1950 "swap." The court released the Steelworkers from liability for their part in this exchange because it [644 F.2d, at 1118] found that they acted not out of racial animus, but instead out of a desire to offer representation to black employees in the Boilermakers and Machinists unions who felt discriminated against by these unions.

While the district court thus released the Steelworkers from liability, it also ruled that if it had erred in holding the seniority system bona fide, then the Steelworkers must share in union responsibility for that system. The court relied upon a belief that the company, rather than the Steelworkers, acted as the principal advocates of plant-wide seniority. It assumed that the Steelworkers fully supported the 1974 joint union proposal of a "unit preference" restriction upon a plant-wide seniority system.

Finally, the district court held that appellants' 1969 EEOC charges failed to name the International Unions as respondents so as to trigger their liability at that time in the subsequent Title VII suit. The court based this conclusion upon the failure of these charges to explicitly name the Internationals.

We must determine whether the seniority system was bona fide; whether the Steelworkers are liable for that system; and whether the 1969 EEOC charges sufficiently identified the Internationals as respondents.

THE ILLEGALITY OF THE SENIORITY SYSTEM

[3] Section 703(h) of Title VII exempts certain seniority systems from the reach of the Civil Rights Act of 1964:

Notwithstanding any other provision of this Title, it

> shall not be an unlawful employment practice . . . to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

42 U.S.C. § 2000e–2(h). We have held that the immunity created by section 703(h) extends not only to Title VII actions, but also bars section 1981 claims. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed. 2d 74 (1979). Yet the immunity provided by section 703(h) extends to seniority systems with a disparate racial impact only when "differences in treatment [are] not the result of an intention to discriminate because of race." *Teamsters*, 431 U.S. at 353, 97 S.Ct. at 1863; *accord*, *Southbridge Plastics Division v. Local 759*, 565 F.2d 913 (5th Cir. 1978).

[4] To assess the purposes underlying the Bessemer seniority system, we turn to the four factors identified in *James v. Stockham Valves*. The district court correctly found that the Bessemer seniority system had its genesis in purposeful racial discrimination. The record amply supports this conclusion by showing that the system arose in an era of overt racial discrimination at U.S. Pipe, when blacks were assigned to "dead-end" jobs, bargaining seniority units were defined by racial considerations, and seniority provisions allowed transfer to better units only through commission of "seniority suicide." See our refusal to extend section 703(h) immunity to similar seniority systems in *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), and *United States v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981). We need not decide

[644 F.2d, at 1118-9]

whether the court's specific finding of the racial genesis of the Bessemer system is tantamount to a finding of "purposeful discrimination in connection with the establishment . . . of the system," *James*, 559 F.2d at 351, because here, as in *Swint* and *Georgia Power*, we find evidence of discriminatory intent under each of the *James* factors and the totality of all circumstances.

The district court clearly erred in concluding that the Bessemer seniority system was negotiated and maintained free of discriminatory purposes. The record before us amply shows that we again face a situation in which

> the seniority system negotiated through the collective bargaining process tracked and reinforced the purposefully segregated job classification scheme maintained by the company and the conclusion is inescapable that the seniority system it- [644 F.2d, at 1119] self shared in that same unlawful purpose. The seniority system under the collective bargaining agreement was but part and parcel of the total package of purposeful discrimination at [the company].

Georgia Power, 634 F.2d at 936.

Even if the district court correctly held that the racially-charged union elections conformed to industry practice, the 1950 racial "swap" of positions, in defiance of all reason, reinforces the conclusion that the Bessemer seniority system was created and maintained unlawfully. We reject the district court's attempt to isolate this aspect of the seniority system so as to restrict union liability to that incident. We instead view this racial adjustment as an integral piece of evidence which manifested underlying racial purposes. The significance of this final alteration of the bargaining structure cannot be underestimated since it removed almost all of the black workers assigned by the NLRB to craft unions.

[5] The district court also erred in its consideration of the *James* factor which focuses upon the equality with which a seniority system operates. The disparate impact of the Bessemer seniority system on black employees is obvious and well documented by the record. The district court recognized this disparate impact but concluded that it was irrelevant. We have since held that disparate impact constitutes not only relevant evidence of discriminatory purpose, *Swint*, but can conclusively resolve the "equality" factor in favor of those who have suffered such discrimination. *See Georgia Power*. As for the district court's reliance upon the facial equality with which the Bessemer seniority system operated, we merely note that here again "facial equality . . . was but a mask for the gross inequality beneath." *Georgia Power*, 634 F.2d at 935.

[6] Other factors aside from those isolated by *James* may be considered in determining the purposes underlying a seniority system. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192. One such factor in this case, a factor apparently ignored by the district court, is the overtly discriminatory policies of each of the craft unions at the time the seniority system was created and "corrected" to follow racial lines. At that time, for instance, the Machinists barred blacks from union membership, the Boilermakers relegated blacks to inferior "auxiliary" locals, the Molders segregated the few blacks in their Alabama locals, and the Patternmakers claimed that there were no "qualified niggers" in that state. The Supreme Court has held that a court may take judicial notice of the exclusion of black workers from craft unions on racial grounds, *United Steelworkers of America v. Weber*, 443 U.S. 193, n. 1, 99 S.Ct. 2721, n. 1, 61 L.Ed.2d 480

[644 F.2d, at 1119-20]

(1979), but the record before us provides ample evidence of the overtly discriminatory policies of the craft unions involved in this case. Little purpose would be served by detailing these discriminatory policies. Such policies, however, offer strong additional evidence of racial motivations underlying the seniority system defended by the craft unions in the face of mounting opposition by the company and the Steelworkers.

In summary, the totality of circumstances surrounding the creation and maintenance of the seniority system at the Bessemer plant again "leaves us with the definite and firm conviction that a mistake has been made. There can be no doubt, based upon the record in this case, about the existence of a discriminatory purpose." *Swint*, 624 F.2d at 533 (citations omitted). Our recent decisions in *Swint* and *Georgia Power*, overruling conclusions of nondiscriminatory intent, virtually compel condemnation of the Bessemer system because of the striking similarity between the "lock-in" seniority provisions and the comparable clarity of other evidence of discriminatory purpose. As in those cases, we find error in the failure of the district court (1) to consider the disparate impact of such systems, (2) to appreciate the integral importance of particular racial deviations from industry practice, (3) to focus upon additional factors, such as the avowedly racist policies of the craft unions, and (4) to recognize the cumulative effect of separate pieces of evi- [644 F.2d, at 1120] dence of racial motives, evidence which here compelled the specific finding that the seniority system had its "genesis in racial discrimination." We therefore hold that the Bessemer system cannot qualify for the immunity extended by section 703(h) of Title VII only to those se-

niority systems created and maintained without intention to discriminate. 42 U.S.C. § 2000e–2(h).

THE STEELWORKERS UNION

The district court refused to excuse the Steelworkers from liability for any violation of Title VII by the Bessemer seniority system. The court viewed the Steelworkers' efforts to institute plant-wide seniority as subsidiary to such efforts by the company. The court focused upon the Steelworkers' adoption of the 1974 joint union proposal for "unit preference" as evidence of its failure to support a true plant-wide seniority system. The Steelworkers cross-appeal this decision on the ground that they took every reasonable step to bring about plant-wide seniority. They argue that they settled upon the "unit preference" proposal only because it appeared to represent the best option available in light of craft union resistance to complete plant-wide seniority. Appellants support the court's decision by arguing that while the Steelworkers were not "passive" in opposing the discriminatory seniority system, their efforts to abolish it were "ineffectual." Appellants would have us direct the district court to take into consideration the Steelworkers' relatively commendable conduct when apportioning back pay liability among the unions. We refuse, however, to permit the Steelworkers union to suffer even the label of Title VII liability because the record before us clearly demonstrates that they met the legal requirement of taking every reasonable step to oppose a seniority system which operated primarily to discriminate against its own members.

We begin with established principles of law. Section 703(c)(3) of Title VII makes it unlawful for a union to

[644 F.2d, at 1120]

"cause or attempt to cause an employer to discriminate. . . ." 42 U.S.C. § 2000e–2(c)(3). We have recognized that under the Act "[l]abor organizations, as well as employers, have an affirmative duty to take corrective steps to prevent the perpetuation of past discrimination." *Myers v. Gilman Paper Co.*, 544 F.2d 837, 850 (5th Cir.), *modified in other respects on rehearing*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) (citation omitted).

[7] The Supreme Court has cautioned against legally excusing a party involved in an employment practice which had been found to violate Title VII: "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of irradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975) (footnote omitted). One reason for caution in excusing a party involved in an unlawful employment practice stems from the congressional purpose of stimulating self-corrective action by employers and unions.

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Albemarle, at 417–18, 95 S.Ct. at 2371–72 (quoting *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

[644 F.2d, at 1120-1]

[8] Whether a party involved in an established Title VII violation may be excused from liability therefore turns upon whether that party has proved to the full satisfaction of the courts that it has taken every reasonable step to bring employment practices into compliance with the law. In applying this test, we have recognized that even a union which signs a contract establishing an unlawful seniority system may suffer no liability if it actively opposed the adoption of this system. *See James v. Stockham Valves.*

[644 F.2d, at 1121]

This same test has caused us, in the face of different circumstances, to hold a union liable for a seniority system which resulted from agreements negotiated by another union. In *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974), for example, we held the conduct of a union to be violative of Title VII though "disguised by a thin veneer of racial neutrality." This apparent neutrality stemmed from the fact that the union could not negotiate directly with the bus company about the seniority of its members who would transfer to another unit represented by a different union. We discerned that the union had not even made a "concerned attempt" to rectify discriminatory practices since it had not "actively sought" plant seniority. We concluded that the "ineffectual passivism" of the union facilitated the continuance of racial discrimination. We therefore held that this union shared in overall responsibility for the illegal seniority system. In *Myers v. Gilman Paper Co.*, we likewise held a non-signatory union liable for seniority provisions in another union's bargaining agreement on the ground that "[i]t is settled that Title VII required [the non-signatory union] at some point to take 'the affirmative step to initiate negotiations in an effort to salvage

[644 F.2d, at 1121]

for its own ex-members the seniority that they would inevitably and foreseeably lose [upon transfer].' " 544 F.2d at 852 (*quoting Carey*, 500 F.2d at 1379).

[9] After carefully examining the record, we conclude that the Steelworkers diligently sought to bring about a nondiscriminatory, plant-wide system at Bessemer. We reach this conclusion based on the totality of circumstances in this case. In particular, we note the facts stated below.

Appellants do not allege any discriminatory practices by the Steelworkers. The district court found that the evidence in this case supported the general observation that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." The United Steelworkers of America has a well-known history of striving to achieve racial equality and integration in the labor movement.

The Steelworkers local at Bessemer was consistently represented by black officials who had every reason to oppose a seniority system which disproportionately prejudiced its predominately black membership. These officials appear to have taken every reasonable step to bring about plant-wide seniority, from initiation of this proposal on the first day of the 1968 negotiations with the company, to private lobbying efforts in 1971 and 1974 with the craft unions. Their acceptance of the "union preference" system in 1974 clearly represented a reasonable decision to gain ome improvement, rather than suffering complete defeat at the hands of the craft unions.

In view of these and other circumstances evidenced by the record, we absolve the Steelworkers from any responsibility under Title VII for the discriminatory seniority

system at the Bessemer plant. In so holding, we advance the congressional purpose of stimulating self-corrective union action against illegal employment practices. The penalty of back pay liability for those unions which passively acquiesce in discriminatory practices is matched with judicial recognition of those unions which have opposed such violations of the law through every means in their power.

THE LIABILITY OF THE INTERNATIONAL UNIONS

The precise procedural issue before us is whether the original charges filed by appellants with the EEOC identified the Internationals as respondents within the meaning of that portion of Title VII which authorizes legal action only against parties "named" in the administrative charge. 42 U.S.C. § 2000e–5(f)(1).[2] The Internationals [644 F.2d, at 1122] successfully argued in the trial court that they had not been named. Appellants claim on appeal that the Internationals were sufficiently identified in the charges to fulfill the purposes of the Act. We disagree. The significance of this controversy and our conclusion becomes clear, however, only in the context of the procedural history of this case.

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[2] 29 C.F.R. § 1601.12(h) provides:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations therein. Such amendment . . .will relate back to the date the charge was first received.

Originally adopted in 1965 and numbered § 1601.11(9), this regulation was amended in 1979, without altering its substantive content to read as set forth above.

[644 F.2d, at 1122]

Appellants first filed charges with the Commission in 1969. The district court ruled that these charges failed to identify the Internationals as respondents, though they indisputably named the Locals. In 1972, appellants brought this legal action under both Title VII and section 1981, naming the Internationals along with the Locals as defendants. Appellants then amended their original EEOC charges in 1973 to explicitly name the Internationals as respondents.

Commission regulations mandate that amended charges which merely clarify or amplify allegations in a prior charge shall "relate back" to the effective date of the earlier charge.[3] *See Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). The district court ruled, however, that it would be "improper" in this case to treat the amendments as relating back to the date of the original charges. The court viewed the amended charges as an attempted "addition" of the Internationals as respondents, rather than as a mere clarification of previously identified parties.[4]

[3] 42 U.S.C. 2000e-5(f)(1) provides that upon compliance with certain procedures fully met by appellants "a civil action may be brought against the respondent named in the charge" previously filed with the EEOC.

[4] The district court announced and explained its ruling as follows:

> It is clear from the reading of the amended EEOC charges dated August 2, 1973, which were prepared with the assistance of counsel experienced in discrimination matters, that the international unions were being *added* as respondents. The EEOC's earlier findings and right-to-sue letters had, consistently with the wording of the original charges, treated only the local unions and company as respondents prior to that date. While the amended EEOC charges, even though filed ten months after the institution of the lawsuit, are certainly to be recognized as effective against the internationals when filed, it would be improper to treat them as "relating back" for limitations' purposes to the earlier charges.

The district court therefore held that the potential liability of the Internationals commenced in 1971 under section 1981.

[10] Only parties previously identified as respondents in charges filed with the EEOC are subject to subsequent liability under Title VII. 42 U.S.C. § 2000e–5(f)(1). All parties to this suit are in agreement that Title VII limits the liability of such respondents to matters occurring within 180 days of the filing of administrative charges. There is also no dispute that the limitations period in this case for liability under section 1981 extends for one year, with the one year period measured from the commencement of judicial proceedings.

The district court applied these limitations periods to the Internationals in a manner consistent with its conclusion that they were unnamed in the original EEOC charges. The court ruled that the period of potential liability of the Internationals under Title VII began only in 1973, i. e., 180 days prior to their "addition" as respondents in the amended charges. The court extended their possible liability back to 1971 under section 1981, i. e., one year before the filing of the suit in 1972. The court refused to treat the Internationals in the same manner as the Locals when ruling that any Title VII liability on the part of the Locals commenced 180 days prior to the original 1969 charges.

Appellants challenge this restriction upon the potential liability of the Internationals. They argue that the district court erred in holding that the 1969 EEOC charges failed to identify the Internationals as respondents. They insist that the 1973 amended charges merely rendered explicit the clear implication of the Internationals as respon- [644 F.2d, at 1123] dents in the original charges. Appellants therefore contend that the district court committed reversible error in refusing to relate the explicit naming

[644 F.2d, at 1123]

of the Internationals in the amended charges back to the date of the original charges.

[11, 12] We begin with certain well-established principles. The remedial purposes of Title VII, and the paucity of legal training among those whom it is designed to protect, require that a court construe an EEOC charge with the utmost liberality. *E. g., Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977) (liberality required in interpreting the parties named); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (liberality required in interpreting the discrimination alleged). "For a lay-initiated proceeding it would be out of keeping with the Act to import commonlaw pleading necessities to this 'charge,' or in turn to hog-tie the subsequent lawsuit to any such concepts." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 30 n.3 (5th Cir. 1968). A court called upon to interpret such a charge must bear in mind that a fundamental purpose of the charge is to trigger an investigation by the EEOC. "All that is required is that [a charge] give sufficient information to enable EEOC to see what the grievance is about." *Id.* The necessity for equally broad interpretation of such a charge at the administrative and judicial levels stems from the framework of Title VII and its goal of encouraging voluntary compliance through EEOC conciliation.

> The Commission, which must operate on the basis of the administrative charge, rarely drawn by an attorney, must therefore view the charge in its broadest reasonable sense in order to effectively attempt to eliminate, by the administrative process, the discriminatory practices and policies which it finds. . . . Lacking enforcement powers, the Commission's disputes resolution machinery could not succeed if the federal courts were

> not in a position to review the complaint filed in a section 706 proceeding as broadly as the Commission views the charge.

Sanchez, 431 F.2d at 467 (quoting the amicus brief of the EEOC); *see Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977) (deference should be given to EEOC interpretation of a charge). Such policy considerations have caused this court to adopt a rule of reason which permits the scope of a Title VII suit to extend as far as, but no further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge.

> The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is *not* filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. . . . Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than the words of the charge which originally triggered the investigation.

Sanchez, 431 F.2d at 466.

[13] The reasonable limits of an investigation potentially triggered by an EEOC charge define not only the substantive limits of a subsequent Title VII action, but also the parties potentially liable in that action. *See, e. g., Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977); *Kaplan v. International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354 (9th Cir. 1975). In *Kaplan*, the Ninth Circuit focused upon a factual statement in an EEOC charge which explicitly named only a local union, but which necessarily implicated an international union in the alleged discrimination. The court reasoned that the

[644 F.2d, at 1123-4]

fact that a contract specifically complained of had clearly been negotiated by the International sufficed to apprise the EEOC in "general terms" of the possible complicity of the International. The *Kaplan* court held that such general notice to the EEOC was sufficient to permit the International to be named as a defendant in a subsequent suit under Title VII. In so holding, the court relied primarily upon well-established rulings of this court.

[644 F.2d, at 1124]

Our more recent decision in *Tillman v. Boaz* again looked to the factual allegations of an EEOC charge, and the scope of ensuing EEOC efforts, in liberally interpreting the parties named in the charge. In *Tillman*, we held that the City of Boaz, Alabama, was liable under Title VII although it was not specifically named as a respondent, because a letter to the EEOC, specifically incorporated by reference in the EEOC charges, stated that "I would like to file a claim against the City of Boaz . . . ." and the charges themselves listed the City of Boaz as the employer who discriminated against the plaintiff. Pursuant to that letter and the accompanying charges, the EEOC investigated the City as well as its mayor, the named respondent. In that situation, we had no difficulty concluding that both the EEOC and the City had sufficient notice that the City was charged to justify imposing liability on the City.

[14] Applying these precedents and principles favoring liberality to the facts now before us, we must nevertheless conclude that the Internationals were insufficiently implicated in the discrimination alleged in appellants' original charges to have reasonably triggered EEOC investigation of the Internationals. These charges failed to allege specific conduct which clearly implicated the Inter-

nationals. Quite reasonably, the EEOC then omitted the Internationals in its investigative and conciliatory efforts. The Internationals thus failed even to receive informal notice that they had been named through the Commission's administrative processes. Apparently recognizing that they had made a serious, substantive mistake—not a mere technical error of pleading—appellants amended their original EEOC charges to explicitly name the Internationals. Without holding appellants to the same level of draftsmanship as trained attorneys, we are constrained by the facts in this case to uphold the decision of the district court that no liability of the Internationals under Title VII shall commence until 180 days prior to these 1973 amended charges.

CONCLUSION

Because the record clearly demonstrates racially discriminatory purposes underlying the creation and maintenance of the Bessemer seniority system, we hold that it is not bona fide within the meaning of 42 U.S.C. § 2000e–2(h). Since the Steelworkers union took every reasonable step to eradicate this discriminatory system, we exclude them from any liability for that system under 42 U.S.C. § 2000e–2(c)(3). Finally, the fact that the allegations in appellants' 1969 EEOC charges did not clearly implicate the international unions causes us to hold that these charges did not trigger their liability at that time under 42 U.S.C. § 2000e–5(f)(1).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX B

22 FEP Cases 1695

TERRELL v. U.S. PIPE & FOUNDRY CO.

U.S. District Court,
Northern District of Alabama

TERRELL, et al. v. UNITED STATES PIPE AND FOUNDRY COMPANY, et al., No. CA 72-P-0887-S, October 16, 1979

CIVIL RIGHTS ACTS OF 1866 AND 1964

Unit seniority system 108.3315

Unit seniority system that first precluded and then limited use of plant seniority upon transfer to job represented by different union is bona fide under Title VII except for its coverage of certain helper jobs that were transferred in 1950 between seniority units, where this transfer, which separated helper jobs with black incumbents from their related skilled position and joined those with white incumbents to their related skilled position, has not been shown to be in accord with common industry practice, and it was carried out to increase seniority security for certain whites and to increase promotional opportunities of some of them: although seniority system was instituted at time of widespread racial discrimination, it was negotiated, and has been maintained, free of any purpose of racial discrimination, except for 1950 incident.

Action under 42 U.S.C. §1981 and Title VII of Civil Rights Act of 1964 by employees against employer and unions. Seniority system found bona fide except for one aspect.

[22 FEP Cases, at 1695-6]

See also 6 FEP Cases 1027.

Demetrius C. Newton, Birmingham, Ala., Joseph P. Hudson, Gulfport, Miss., and Barry L. Goldstein, Washington, D.C., for plaintiffs.

James P. Alexander, Birmingham, Ala., for defendant employer.

[22 FEP Cases, at 1696]

N. Daniel Rogers, Birmingham, Ala., for defendant IBEW Local 136.

George C. Longshore, Birmingham, Ala., for other union defendants.

Full Text of Opinion

POINTER, District Judge:—For decision by the court in this employment discrimination case is the issue whether certain union defendants are liable to the plaintiffs and the plaintiff class for back pay, costs, and attorneys fees. Liability is premised upon these defendants' roles in establishing and maintaining seniority systems at U.S. Pipe's plant in Bessemer, Alabama, which allegedly discriminated against black employees contrary to 42 U.S.C.A. §§1981 and 2000e-2(c). The claim is not that the seniority systems in question were applied in a discriminatory non-uniform manner. Rather, the claim is that the seniority systems, by according seniority privileges on the basis of seniority units, had a discriminatory effect upon blacks by virtue of the company's having made racially discriminatory assignments to the different seniority units. Of critical importance are the defendants' contentions that the seniority systems were bona fide, neither instituted nor maintained because of any intent to discriminate on the basis of race or color, and that they are therefore immunized from liability under 42 U.S.C.A.

§2000e-2(h).[1]

I. History of the Litigation

A synopsis of the history of the litigation is helpful in understanding the context in which the court is confronted with this seemingly narrow issue.

The complaint, filed as a class action on October 4, 1972, by seven black workers, alleged a broad pattern of racially discriminatory practices at the Bessemer plant of United States Pipe and Foundry Company. Named as defendants were the company, six local unions,[2] and the six international labor organizations with which they were affiliated. Summary judgment was ultimately granted in favor of one international union (IBEW) but denied as to two others (Boilermakers and IAM); and, after a severed trial under F.R.C.P. 42(b), it was determined that the Boilersmakers and IAM internationals had potential liability in the case. See 7 EPD §9055, 6 FEP Cases 1027 (N.D. Ala. 1973).

The case against the remaining twelve defendants proceeded through normal, if prolonged, pretrial prepara-

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[1] In Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 17 FEP Cases 1712 (CA5 1978), the court ruled that immunity under 42 U.S.C.A. §2000e-2(h) would bar not only Title VII claims, but also §1981 claims. See footnote 37, 576 F.2d at 1191-92, 17 FEP Cases at 1736.

[2] Local 2140, United Steelworkers of America ("Steelworkers"); Local 342, International Molders and Allied Workers Union ("Molders"); Patternmakers Association of Birmingham ("Patternmakers"); Lodge 359, International Association Of Machinists and Aerospace Workers ("IAM"); Local 583, Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers ("Boilermakers"); and Local 136, International Brotherhood of Electrical Workers ("IBEW").

[22 FEP Cases, at 1696]

tions. Three pretrial conferences were held, resulting in refinement of the contested issues. The case was allowed to be maintained as a class action, with the class (as last defined) being "all black persons who have been at any time after March 24, 1969 (or who may hereafter be) employed as production and maintenance employees at the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company." Extensive discovery was undertaken—involving some 20 sets of requests for admissions, 25 sets of interrogatories, 10 sets of requests for production of documents, and 15 depositions—much of which being prompted by the intervening decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). Modifications to the seniority systems as a result of new collective bargaining agreements in January 1975 and November 1977 had their own effect upon the litigation, as did the fact that the Molders and Patternmakers unions had ceased to represent workers at the plant.

Shortly before the scheduled trial on liability issues—the amount of back pay, if any, was to be determined at a later trial as necessary—the court was advised that agreements to settle had been reached which, if approved, would resolve most of the issues in the case. All parties to the litigation had agreed to modifications in the seniority system. The company had agreed to pay $510,000 in back pay for distribution to the plaintiff class and $10,000 towards litigation expenses of plaintiffs' counsel, acknowledging also an obligation to pay plaintiffs' attorneys fees in an amount which, if not resolved by agreement, would be determined by the court. The plaintiffs agreed that they would not seek a back pay award against the Steelworkers unions and would not be entitled to a back pay award against the IBEW.

[22 FEP Cases, at 1696-7]

In agreeing to the proposed settlements as a compromise of the issues to be resolved thereby, the plaintiffs did not admit that such relief would be all to which they would be entitled in the event of a trial, nor did the defendants [22 FEP Cases, at 1697] admit that they had violated the employment discrimination laws. Even if the settlement were to be approved—which would involve a hearing after notice to the class members—there would remain certain unresolved issues for trial, principally the plaintiffs' claim that the Boilermakers, Patternmakers, Molders, and IAM unions were liable for back pay, costs, and attorneys fees. Moreover, the plaintiffs reserved the right to seek an award of costs and attorneys fees against the Steelworkers and IBEW unions and, while admitting that their evidence would not support a back pay award against the Steelworkers unions, did not waive any entitlement to such an award if liability therefor were to be established by evidence presented at trial by the other unions.

Due to the readiness of the parties, the court determined to go forward with the trial of the liability issues that would remain were the settlements to be approved, with a hearing on the settlements to be scheduled at a later date. (It was, however, first determined by the court that the terms of the proposed settlements were within the range of reasonableness such that a hearing should be held to consider any objections to them.) It was recognized that, should the settlements ultimately be disapproved, the company would not be bound by the findings made by the court in connection with the claims against the unions, but would be given later the opportunity to offer further evidence relevant to the claims made against it.

[22 FEP Cases, at 1697]

With the issues thus narrowed to the plaintiffs' claims of monetary liability on the part of the unions, trial was completed in three days—a period which belies the quantity of evidence (frequently presented by summaries and data compilations) covering some forty years of industrial relations at U.S. Pipe's Bessemer plant. After the trial it was decided that a hearing on the proposed settlements should be deferred until entry of a ruling on the monetary claims against the unions, thereby enabling the class members to be better informed as to the consequences of the proposed settlements.

As indicated, the evidence covers a span of several decades. This evidence has particular significance on the question of whether the company made racially discriminatory assignments of employees to the different seniority units and on the question as to the intent of the unions in agreeing to (if not advocating) seniority systems based on seniority units. It is, however, appropriate at the outset to note that the claims of discrimination on which liability of the unions in this action may be premised are far more limited in duration under applicable periods of limitation. Claims under Title VII may be based on employment practices which preceded the filing of an EEOC charge naming such party by 180 days (plus ending holidays); those under 42 U.S.C. 1981 may be based on practices which preceded the filing of the lawsuit by one year. Upon a consideration of the filing of charges with the EEOC, which were introduced into evidence, and of the filing of the complaint in this case, of which the court takes judicial notice, it appears that the following are the earliest dates on which liability can be premised: December 23, 1968, as to Molders' Local 342; January 13, 1969, as to IAM Lodge 359; January 26, 1969, as to Boilermakers

Local 583 and as to the Patternmakers Association of Birmingham; and October 4, 1971, as to the four international labor organizations. Without merit are the plaintiffs' attempts to establish longer periods of limitations against the international unions on the basis of amended Title VII charges [3] or on the basis of pretrial waiver.[4]

One final procedural matter should be covered in this discussion of the history of the litigation. After the plaintiffs and the company had agreed to a settlement in mid-1979—almost seven years after the lawsuit had been instituted—several of the union defendants filed a cross-claim (mislabelled a counterclaim) against the company, seeking contribution or indemnification should the unions

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[3] It is clear from the reading of the amended EEOC charges dated August 2, 1973, which were prepared with the assistance of counsel experienced in discrimination matters, that the international unions were being *added* as respondents. The EEOC's earlier findings and right-to-sue letters had, consistently with the wording of the original charges, treated only the local unions and company as respondents prior to that date. While the amended EEOC charges, even though filed ten months after the institution of the lawsuit, are certainly to be recognized as effective against the internationals when filed, it would be improper to treat them as "relating back" for limitations' purposes to the earlier charges.

[4] Leaving aside the legal dispute whether identification of respondents in EEOC charges is truly jurisdictional or not, plaintiffs' claim of a waiver by the internationals fails to take account of the fact that EEOC charges were filed (albeit not until August 1973) against the internationals. The potential problem arising from failure to name the internationals in the original charges was noted in open court back in October 1973 as one which would involve further study. See 7 EPD §9055, 6 FEP Cases 1027. The international unions have not waived their rights to contest the periods covered by the EEOC charges.

[22 FEP Cases, at 1697-8]

be held monetarily liable to the plaintiffs. This belated claim is due to be rejected. First, it is under the circumstances untimely and in the exercise of discretion should not at this late stage be permitted. Cf. Zenith Radio Corp. v. Hazel- [22 FEP Cases, at 1698] tine Research Inc. 401 U.S. 321 (1971). Second, if allowed, it would be without merit. Contribution among joint tortfeasors is not, at least in favor of one charged with an intentional tort, allowed—and in the context of this particular case involving potential immunity from liability by virtue of an allegedly bona fide seniority system the unions would not be held liable to the plaintiffs unless they were found to have acted with racially discriminatory intent in establishing or maintaining the seniority system. Moreover, as a factual matter based on the evidence in this case, it is clear that, to whatever extent the seniority systems negotiated in the 1968, 1971, 1975, and 1977 periods may have perpetuated the effects of prior discrimination, the deficiencies would be primarily chargeable against the unions, not the company.

II. The Seniority System and Its Effect Upon Blacks.

Analysis of the seniority system during the period under direct attack by the plaintiffs involves a study of twenty collective bargaining agreements entered by the company—with six unions in October 1968 and in November 1971, and with four unions in January 1975 and in November 1977.

The system in effect from November 1, 1968, through October 31, 1974, was essentially one based on seniority

units.[5] The proximately 135 job titles as to which the Steelworkers had jurisdiction were divided among twenty-four such seniority units; e.g., Cement Lining, deLavaud Cores, Machine Shop, Melting, Shipping. The some 23 job titles as to which the IAM had jurisdiction were divided among five such units; i.e. Blacksmith Shop, Machine Shop, deLavaud Pipe Cutters and Drillers, Mechanical Maintenance-Welding, and Physical Testing Laboratories. The four positions as to which the Pattern-makers had jurisdiction were in a single seniority unit. The other three unions, each of which represented but a single craft position (journeyman and apprentice), were apparently treated as separate seniority units.[6]

Seniority for purposes of promotion, layoffs, and recalls was based, with few exceptions, upon continuous service within a particular seniority unit. The Steelworkers and IAM contracts did contain provisions which permitted an employee accepting transfer to another seniority unit on a reduction in force to retain seniority in the old unit (while beginning to build seniority in the new unit) until offered recall back to the old unit, at which time an election between the two would have to be made. The Steelworkers 1968 and 1971 contracts also provided for bidding on vacancies in other Steelworkers' seniority units, and their 1971 contract provided for plant-wide service to be used on reductions in force to roll junior employees on the some 35 lowest-paid Steelworker positions. None of the

[5] The description in the contracts of the seniority units as "departments" is somewhat misleading, for it is clear that the units were more numerous than the operating departments of the company.

[6] While the Boilermaker and IBEW contracts described seniority as being plantwide, the special language relating to seniority of apprentices indicates that seniority was being measured on the basis of service in positions represented by such unions.

[22 FEP Cases, at 1698]

contracts provided for transfers between seniority units represented by different unions, and it is clear from the evidence that, when that did occur, the employee was treated in the new unit as a new employee for seniority purposes.

The January 1975[7] agreements between the company and the four[8] remaining unions adopted a form of plant-wide seniority. In each contract seniority was to be measured by plant continuous service and vacancies were to be posted for bids on a plant-wide basis. Use of this seniority, however, on reductions in force was basically restricted to positions represented by the same union, with bumping across union lines allowed only at the lowest paid positions, and journeymen were protected against displacement by other than journeymen of the same craft. Moreover, a union preference rule was adopted for promotions, requiring that vacancies be "offered first" to members of the union having jurisdiction over the position. In the 1977 contracts this promotional preference was reworded as "considered first", and restrictions on the frequency of transfers were imposed.

Seniority systems such as in effect at U.S. Pipe's Bessemer plant since 1968—allowing for only limited use of plant service in the event of transfers between seniority units and containing no "rate retention" provisions—have long been recognized in this and other circuits as

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[7] A gap between collective bargaining agreements of almost three months was occasioned by a strike at the expiration of the 1971-74 contract.

[8] In the latter half of 1972 the General Foundry and the Pattern Shop were closed. Thereafter the Patternmakers and Molders unions ceased to represent any employees at the Bessemer plant.

[22 FEP Cases, at 1698-9]

having a discriminatory effect in industrial settings where blacks were discriminated against in initial job assignments. This principle has not been undermined by International Brother- [22 FEP Cases, at 1699] hood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). In Teamsters, the Supreme Court did not hold that there would be no discriminatory impact from such inhibitions upon transfers, but rather held that, upon due showing of the bona fides and non-discriminatory purposes of such a seniority sytem, immunity from Title VII liability would be provided under 42 U.S.C.A. §2000e2(h). So, in this case—leaving aside for the moment whether the standards of 2000e2(h) have been satisfied—it is clear that a prima facie showing of liability under Title VII has been made if there has been discrimination in initial job assignments among the various seniority units. See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cases 827 (CA5 1977), cert. denied, 434 U.S. 1034, 16 FEP Cases 501 (1978).

The evidence presented at this trial[9] establishes a history of racial discrimination by the company in making initial job assignments. Not only were there virtually no assignments of blacks to positions represented by the craft unions, but even in assignments to the various non-craft positions represented by the predominantly black Steelworkers a color-conscious pattern is obvious. There were at this plant—as has been found to be true in many other industrial plants in the area—jobs and seniority

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[9] As earlier indicated, this and related findings are not binding upon the company, which—if the proposed settlement be rejected—would be given the opportunity to present other evidence for the court's consideration.

[22 FEP Cases, at 1699]

units that were for practical purposes reserved either for whites or for blacks. As late as 1971, some time after the company had made changes in its assignment policies, there remained nine one-race Steelworkers' seniority units with more than one employee.

It is unnecessary for purposes of this decision to determine when this discrimination by the company ceased. Nor is it necessary to determine whether this assignment policy had adverse economic impact upon blacks, Swint v. Pullman Standard, 539 F.2d 77, 13 FEP Cases 604 (CA5 1976), although here it is clear that the earnings rates in white-only seniority units were higher than those in black-only seniority units. Nor is it necessary at this stage of the proceedings to determine how many, or which, black employees were injured during the period at issue in the litigation by the discrimination-perpetuating seniority system. It sufficies to note that the seniority system has been shown to have a discriminatory impact upon black employees.

This determination of prima facie liability does not, however, necessarily mean that the unions, local and international, are to be held legally responsible under Title VII or §1981 for the consequences of the seniority system. See James, supra, 559 F.2d at 353-54. The concepts of culpability, or relative culpability vis-a-vis that of the company, as noted in James, will be considered later in this opinion. At this point the court notes that the 1971 contract with the Molders was solely with the local union—the international was not a party to it, did not sign it, and so far as appears did not participate in its negotiation or implementation. Under Sinyard v. Foote & Davies, 577 F.2d 943, 17 FEP Cases 1344 (CA5 1978), the

prima facie liability of the International Molders and Allied Workers Union is limited to the period from October 4, 1971, one year before filing the lawsuit, to October 31, 1971, the expiration date of the last contract in which it had in any way participated.[10]

III. The Bona Fides and Purposes of the Seniority System.

This court has previously held that the burden of persuasion on a claim of immunity under 2000e-2(h) is upon the defendants. Swint v. Pullman Standard, 17 EPD §8604, 17 FEP Cases 730 (N.D.Ala. 1978). The court there also analyzed the standards by which such a defense is to be measured under the Teamsters and James decisions—an analysis which need not here be repeated other than to emphasize that the factors outlined in James for special consideration are "ultimately but aids, or focal points, for deciding 'whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system,' which is in turn 'integral to a determination that the system is or is not bona fide.' " 17 EPD at 7105, 17 FEP Cases at 739.

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[10] The period of prima facie liability for Molders' Local 342 is from December 23, 1968, to July 1972; for the Patternmakers League of North America from October 4, 1971, to November 1972; and for the Patternmakers Association of Birmingham from January 26, 1969, to November 1972. The periods of prima facie liability for the local and international Boilermakers and IAM unions are from the applicable limitations dates, earlier discussed, to the present time, although it is clear that the adoption of modified plant service in January 1975 has had ameliorating effects for many black employees.

[22 FEP Cases, at 1699-1700]

A. Neutrality of the System.

The provisions in the seniority rules which precluded (and after 1975 limited) use of plant service upon transferring between jobs represented by different unions were facially neutral. [22 FEP Cases, at 1700] That is, by their wording they applied equally to all whites as well as to all blacks. Likewise, the evidence establishes that in actual operation these provisions were applied in a uniform manner without regard to race or color of the employee.

The plaintiffs assert that these inhibitions upon transfer affected more blacks than whites. To the extent this argument is based upon the fact that there were more black production and maintenance employees than white it is clearly correct but of little significance.[11] Of greater merit is their position that, when the economic disparities of the different seniority units are considered, a much larger percentage of blacks than whites would have had reason to desire transfer but for loss of seniority under the rules. As noted in Swint, supra, this argument has some similarity to a proposition rejected by the Fifth Circuit in the earlier Swint decision, 539 F.2d 77, 13 FEP Cases 604 (CA5 1976). The argument further assumes that all employees would have the requisite abilities and aptitudes (whatever those may be) for entry into craft positions, whereas it may well be that the inhibitions to transfer into a given craft union had more actual impact upon white craftsmen in other units than upon black production workers.

In any event, the plaintiffs' argument on this point is virtually foreclosed by Teamsters. In that case, as dis-

[11] It could hardly be argued that the greater the percentage of black workers, the more suspect the seniority system, and *vice versa*.

cussed in Swint, supra, 17 EPD at 7100, 17 FEP Cases at 733-734, more whites than non-whites in absolute numbers, but a higher percentage of non-white than of white employees in relative terms, were inhibited by the seniority rules from transferring to the economically more desirable line-driver jobs. Yet, despite either disparity, the Court in Teamsters viewed the system as applying "equally to all races and ethnic groups." 431 U.S. at 355. By like token, the conclusion must be reached that the seniority system here under attack has been "neutral", applying equally to black and white.

B. Rationality of Seniority/Bargaining Units.

The separation of several functionally related jobs into different seniority units casts an obvious shadow upon the sytem here under challenge. The explanation offered by the defendants is that there have been six different unions representing production and maintenance employees, with the employees in some departments divided between two unions. These representational issues, the defendants say, were resolved in keeping with—indeed, pursuant to elections directed by—NLRB decisions. Implicit in the defendants' argument, and not challenged by the plaintiffs, is that structuring of seniority benefits to units which follow union lines has been, at least until recently, in accord with industry practice.[12]

The plaintiffs meet this argument frontally, analyzing the development of the representational units and finding

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[12] It should be noted that, until the last decade this approach to seniority has also been followed by the predominantly black Steelworkers. In their post-trial brief plaintiffs acknowledge (p. 8) that the departmental systems of seniority are not in issue in this case.

[22 FEP Cases, at 1700]

the units themselves to be inconsistent with industry practice and, indeed, the product of racial animus over the years.

The basic components of the representational structure were defined as a result of elections directed by the NLRB in early 1940. See In the Matter of United States Pipe & Foundry Company and Steel Workers Organizing Committee, 19 NLRB No. 102, 21 LRRM 671 (1940). In this inter-union struggle for representation, five election units were designated in keeping with then prevailing NLRB policies, in each the industrial union (the predecessor of the Steelworkers) being pitted against an A.F. of L. union.[13]

That the elections had racial implications cannot be doubted. The Patternmakers and IBEW were selected as representatives by small, all-white, all-craft election units. The IAM, which barred blacks from union membership, and the Boilermakers, which relegated blacks to inferior "auxiliary" lodges, were selected by units composed primarily of white craftsmen. The bulk of the employees, predominantly black, were in the fifth unit, and chose the Steelworkers over the Molders, the latter having apparently alienated many blacks by what were perceived to be discriminatory practices. It may be noted that, had the Steelworkers won any of the other elections, such units would have been combined with the fifth unit as a single bargaining element. On the other hand, had all the elections been reversed, there would have resulted the same

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[13] It would be inaccurate to refer to the Molders as a craft union inasmuch as they were seeking to continue to represent all P&M workers not covered in the representational claims of the other A.F. of L. unions.

[22 FEP Cases, at 1701]

basic separation between craft [22 FEP Cases, at 1701] and noncraft units which is at the root of the plaintiffs' present attack.

The configuration of these original election units was not, however, irrational when viewed in the perspective of the existing conflict within the labor movement concerning craft and industrial unions. Nor were the claims made by the various unions at this time inconsistent with their own representational goals—it being significant on this point that, notwithstanding discrimination against blacks within their own organizational structures, the IAM, the Boilermakers, and the Molders were nevertheless seeking to represent black employees at U.S. Pipe. While the outcome of the elections was no doubt affected by racial considerations—by both blacks and whites—it must be kept in mind that the national policy permitting self-determination by affected employees within units determined under NLRB proceedings requires, by its very nature, tolerance for individual choices which may be the product of prejudice or otherwise ignoble. This is not to say that racial overtones involved in the initial certifications are unimportant in considering the bona fides of later seniority systems under all factors listed in James; it is rather to say that, despite these overtones, the original structuring of representational units was rational and in accord with general NLRB precedents and common industry and union practice.

In 1949 the Molders were back before the NLRB, this time obtaining an order for a special representational election for a unit composed of molders, coremakers, and their apprentices. See In the Matter of United States Pipe and Foundry Company and International Molders

[22 FEP Cases, at 1701]

and Foundry Workers Union, 84 NLRB No. 105, 24 LRRM 1331 (1949). For this small, all-white, craft unit, the Molders won. In attacking this restructuring, the plaintiffs, in addition to emphasizing the racial composition of the new unit, argue that exclusion of the helpers (who were black) was inconsistent with the common organizational goals of the Molders. However, a reading of the NLRB opinion makes it apparent that the board's decision to permit the special election was based upon its policy to allow separate recognition of a group of skilled craftsmen—in essence, that the election would not have been allowed had helpers been included in the proposal. The court concludes that this restructuring, like the original certifications, is due to be treated as rational and consistent with NLRB precedents and standard industry and union practice. It is of interest that the NLRB opinion recites that there had been no interchange between these positions and others in the same department during the nine-year period of representation by the Steelworkers. That is, the molders and coremakers had been treated as a separate seniority unit even when represented by the predominantly black Steelworkers.

In 1950 there were further changes in union representation, this time independently of NLRB proceedings. It appears from business records that during the 1940's some shifts in union allegiance had taken place, with white employees in some Steelworker poisitions paying dues to the IAM or Boilermakers and with blacks in IAM and Boilermakers positions paying dues to the Steelworkers. The evidence, while scanty, indicates that this disaffection by these blacks resulted from their belief that they were being treated unfairly by their designated union representatives; the reason for this action by the whites would,

under the evidence, be only speculation.

In any event, in October 1950 agreements were entered by the company, Steelworkers, IAM, and Boilermakers, under which union jurisdiction over certain positions was altered. The Steelworkers gained jurisdiction over boilermaker helpers, over helpers from the blacksmith department, and over crane hookers—all of whom were black. The Steelworkers ceded jurisdiction over flask patchers, over machine and crane operators, and over "Helpers (White) To be promoted to Millwright Trainee"—all of whom were white. The IAM and Boilermakers became, like the other craft unions, all-white—a situation that did not change until the mid-1960's.

These changes were certainly understandable—solving an administrative problem for the company and satisfying the desires of the thirty-seven job incumbents. While understandable, the changes were not, however, rational. It will be noted that inconsistent approaches are taken with respect to helper positions—separating some (those with black incumbents) from their related skilled positions, while joining others (those with white incumbents) to their related skilled positions. Nor has it been shown that modification of board-certified units was in accord with common practice in the industry.

The establishment in the mid-1960's of the Group II Molder position had some of the attributes of a change in union representation. This job, created when manufacturing changes were made by the company, was added to the unit represented by the Molders, and [22 FEP Cases, at 1702] was filled by persons who had occupied Steelworker positions, including black Molder Helpers. This alignment was certainly rational and, indeed, but for

[22 FEP Cases, at 1702]

closing of the department in 1972, might have provided a route by which blacks would have progressed into craft positions.

In summary, the court concludes that—with the exception of the positions involved in the 1950 inter-union transfers—the bargaining units and in turn the seniority units were rational and in accord with NLRB precedents and common industry practice. The contrary conclusion is reached with respect to the jobs affected by the 1950 changes.

C. Genesis of Seniority System.

There can be no doubt but that the seniority system was instituted at a time of widespread racial discrimination—in the plant, in the unions,[14] and in the community as a whole. There is no need even to recite here the evidence presented in this cause to show that discrimination, or to consider the propriety of taking judicial notice of such matters.[15] Moreover, as was discussed supra, racial considerations were involved in the 1940 elections which produced the bargaining units and in the 1950 inter-union transfers of certain positions between bargaining units.

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[14] The evidence in this cause does support the finding, as was also true in Swint, supra, 17 EPD 7103-04, 17 FEP Cases at 738, that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." 17 EPD 7104, 17 FEP Cases at 738.

[15] By footnote in a recent decision, the Supreme Court has, without apparently considering the limitations of Rule 201 of the Federal Rules of Evidence, indicated that judicial notice could be taken of the exclusion of blacks from craft positions. See United Steelworkers v. Weber, 443 U.S. 193, 47 L W 4851, 4852 n. 1. 20 FEP Cases 1 (June 27, 1979).

[22 FEP Cases, at 1702]

The decision that this factor should be resolved "in favor of" the plaintiffs' position in this litigation does not mean that the seniority system necessarily falls outside the immunity of 42 U.S.C.A. §2000e-2(h).[16] This factor is but one of several focal points for consideration and, as noted in Swint, supra, 17 EPD at 7103, n. 20, 7107, 17 FEP Cases at 737, is not dependent upon a finding of causative relationship between racial discrimination and the seniority system itself.

D. Purposes of Seniority System.

The fourth factor is "whether the system was negotiated and has been maintained free from any illegal purpose." James, supra, 559 F.2d at 352. Extensive evidence has been presented to the court concerning the postures and proposals of the parties during the collective bargaining negotiations of 1968 and subsequent triennial sessions; the positions of the parties with respect to earlier agreements is left largely to inference.

It appears that the fundamental characteristic of this seniority system remained constant from formal unionization in 1940 to the early 1970's – that is, allowing exercise of seniority for promotions, layoffs, and recalls only as among employees of the same union working in the same department and measuring that seniority by the length of employment in the particular seniority unit. This type

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[16] To the extent, as argued by plaintiffs ,that Chrapliwy v. Uniroyal, Inc. 15 EPD 97933, 15 FEP Cases 822 (N.D.Ind. 1977), can be read as holding unavailable the §2000e-2(h) immunity for all seniority systems which were adopted at a period of racial discrimination, this court disagrees, believing that construction to be inconsistent with Teamsters and James.

[22 FEP Cases, at 1702-3]

of seniority, which has been commonplace until relatively recently, was the form adopted by the all-white unions (IBEW and Patternmakers), by the predominantly-white unions (IAM and Boilermakers), and by the predominantly-black union (Steelworkers). It was the form adopted by the Molders when they gained recognition in 1949. The court concludes that in each instance the system was adopted for other than racial reasons. More particularly, it is clear that the failure by the craft unions to adopt a system allowing employee transfers with carryover of seniority was not due to a fear of black encroachment—it was rather to protect against competition from other white craftsmen.

The alterations to the seniority units which occurred in 1950 stand on a different footing. The court views these changes as racially motivated—intended to, and effecting, increased seniority security for certain whites (by removing them from a Steelworkers' unit and by placing them in a craft union from which blacks were concurrently removed), as well as increasing promotional opportunities for some of them (placement as Millwright trainees).

A system of plant-wide seniority was, as previously indicated, instituted in the 1975 contracts with the unions which then remained i.e., the Steelworkers, IAM, IBEW, and Boilermakers. As might be expected, agreement to such a fundamental change did not occur overnight. Back in 1968 negotiations the company had indicated a willingness to consider transfers between bargaining units without forfeiture of seniority. While nothing came of this suggestion, the Steelworkers and IAM contracts did [22 FEP Cases, at 1703] provide for retentions of seniority on intra-union transfers during a reduction in force, and

the Steelworkers contract provided for bidding on vacancies in other Steelworkers' seniority units, though on the basis of departmental age. In the 1971 negotiations the company proposed to the unions a form of plant-wide seniority for inter-unit transfers; and an "Inter-union Seniority Agreement" was actively discussed among the various unions. Accord, however, was not reached—not only because, as plaintiffs emphasize, of resistance by some of the craft unions, but also because of division within the Steelworkers union. It should be noted that the 1971 Steelworkers contract retained the concept of departmental age for promotional purposes, and permitted use of plant-age on layoffs only at the lowest-paid Steelworker positions. The limitations placed under the 1975 and 1977 agreements upon use of plant-wide seniority—i.e., the union preference on promotions and provision that journeymen would not be displaced on reductions by other than journeymen of the same craft—constituted a joint union proposal, the Steelworkers not pressing for adoption of the broader-form company proposal in order to present a common union front.

Racial considerations were involved in the 1968, 1971, 1975, and 1977 negotiations concerning the modification of seniority, but in an unusual way. The clear message conveyed upon a reading of the negotiation minutes, and substantially confirmed by the testifying witnesses, is that racial considerations were involved, not in *opposing* the changes in the seniority system, but rather in *proposing* those changes. The push for change—which was primarily by the company and to a lesser degree by the Steelworkers—was largely motivated by a fear of the outcome of claims being pressed administratively and later in court under Title VII. The concern was that the seniority system—without regard to its bona fides and

[22 FEP Cases, at 1703]

purposes, for Teamsters had not yet been decided—would create liability for prior discrimination and in any event result in court-ordered plant-wide seniority. This is not to say, of course, that the Steelworkers' bargaining representatives were not also motivated by a growing awareness of increased promotional opportunities afforded by a broader seniority system—a fact, however, which had not prompted Steelworker negotiation proposals in the 1940-68 period. As broadened seniority came to be seen by Steelworkers as increasing their opportunities, it was also perceived by members of the craft unions as threatening their job security—and it was this latter perception, not the color of their potential competitors, which caused their resistance to the change in seniority. Their opposition ultimately yielded, but only when confronted by firmness in the company's position and by the then apparent certainty (pre-Teamsters) of judicial intervention —a point highlighted by their continued insistence on protection in the event of layoffs against their fellow white craftsmen.

In summary, the court concludes that, with the exception of the changes in the system effected by the 1950 transfers, the seniority system here under challenge was negotiated, and has been maintained, free of any purpose of racial discrimination.

E. Totality.

The court is called upon under James to use the four factors as aids for deciding "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system", which is in turn "integral to a determination that the system is or is not bona fide." 559 F.2d at 351. The "genesis" factor is decided favorably to the plaintiffs' position with respect

to the entire seniority system, provided, that is, that the factor be evaluated without regard to any causative relationship between the existence of discriminatory practices and the seniority system itself. The "neutrality", or equal application, factor is decided favorably to the defendants' position with respect to the entire seniority system. The "rationality" and "purposes" factors are decided favorably to the plaintiffs with respect to certain changes in jobs effected in 1950, but in other respects favorably to the defendants.

The four factors are not stones to be placed mechanistically on an imaginary scale. Looking however to these factors and, indeed, to the totality of the system, the court concludes, with one exception, that the system has been "bona fide"; that the differences in terms, conditions, or privileges of employment resulting thereunder have not been "the result of an intention to discriminate" because of race or color; and that the defendants have met the burden of proving the applicability of 42 U.S.C.A. §2000e2(h).

The one exception relates to the transfer of certain jobs in 1950 between seniority units. The differences in terms, conditions and privileges of employment resulting from these transfers are the result of an intention to discriminate because of race and color and [22 FEP Cases, at 1704] accordingly are not protected under §2000e-2(h).[17]

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[17] The question may well be asked whether some aspects of a seniority system can be immunized under §2000e-2(h), while others not. While an affirmative response is given under the facts of this case, the court can envision circumstances in which the pernicious portion of a system would effectively poison the system as a whole. That is not the situation here.

[22 FEP Cases, at 1704]

IV. LIABILITY

It is appropriate to call for a second stage of trial, in which class members—now armed with a presumption of discrimination—can present individual claims for damages. These claims will be quite limited; i.e., during the applicable period they were injured by virtue of jobs not having remained in the seniority units to which they were allocated prior to the 1950 agreements.

Liability for such claims as may be established is due to be fixed upon Lodge 359 of the IAM respecting those positions switched between the Steelworkers and the IAM and upon Local 583 of the Boilermakers respecting those switched between the Steelworkers and the Boilermakers. The internationals of the IAM and Boilermakers are not shown to have been sufficiently involved in these 1950 agreements to justify charging them with responsibility therefor. The Steelworkers, while a party to these agreements, do not appear to have acted from any racial animus—having rather merely accepted additional blacks who felt discrimination in their certified union and having released whites who apparently preferred representation by an all-white union. The Patternmakers, Molders, and IBEW are likewise not chargeable with responsibility in connection with these agreements, to which they were not even parties.

The applicable period of damage claims will begin on January 13, 1969, with respect to the potential liability of IAM Lodge 359, and on January 26, 1969, with respect to that of Boilermakers Local 583. The defendants have asserted that, with declining employment at the plant and with elimination of apprenticeship programs, there were very few vacancies after these dates. It may also be

that class members who may make claims with respect to such vacancies may be shown not to have had the necessary qualifications for such positions. These, however, are matters which are for consideration during a second stage of trial, and not at this point.

V. Conclusion

With respect to the aspect of the seniority system found to violate Title VII, the court will order injunctive relief [18] and will provide for a second trial to determine the liability of IAM Lodge 359 and Boilermakers Local 583 for back pay, costs, and attorneys fees.[19] All parties are directed to proceed with preparations for sending of notice to class members concerning the proposed settlements, which notices shall indicate the substance of this ruling.

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[18] The agreement proposed by the parties covering injuctive relief, if approved by the court, may resolve this issue.

[19] The award of attorneys fees against the two unions will take into account the limited degree to which the plaintiffs have been "prevailing parties" in this litigation. The extent to which claims for back pay against these unions may be affected by distribution of settlement funds (if the settlement be approved) contributed by the company will be for consideration in subsequent proceedings.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 80-7107
80-7256

D. C. Docket No. CA 72-887 & CA-72-P-0887-S

Joseph TERRELL, Walter Dudley, Thomas Green, Johnny Long, Albert Mason, Marcus Oakes, Sam Walker, on behalf of themselves and the class they represent,
Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO. et al.,
Defendants,
Local 2140, United Steelworkers Union Local 342, International Molders, Allied Workers Union, et al.,
Defendants-Appellees.

Joseph TERRELL, Jr., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO. et al.,
Defendants,
Local 2140, United Steelworkers Union,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Alabama

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Before FAY and HATCHETT, Circuit Judges, and GROOMS,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the plaintiffs-appellants pay to the defendants-appellees the cost on appeal, to be taxed by the Clerk of this Court.

May 14, 1981

*District Judge of the Northern District of Alabama, sitting by designation.

APPENDIX D

[U.S. Court of Appeals, FILED Aug. 7, 1981,
Gilbert F. Ganucheau, Clerk]

[U.S. Court of Appeals, RECEIVED
Aug. 7, 1981, Atlanta, GA.]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B**

Nos. 80-7107, 80-7256.

Joseph TERRELL, Walter Dudley, Thomas Green, Johnny Long, Albert Mason, Marcus Oakes, Sam Walker, on behalf of themselves and the class they represent,
Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO. et al.,
Defendants,
Local 2140, United Steelworkers Union
Local 342, International Molders, Allied Workers Union, et al., Defendants-Appellees.

Joseph TERRELL, Jr., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO. et al.,
Defendants,
Local 2140, United Steelworkers Union,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Alabama

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(opinion May 14, 1981, 5 Cir., 198__, ____F.2d____).

(August 7, 1981)

Before FAY and HATCHETT, Circuit Judges, and GROOMS*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL
RULE 17 FOR STAY OF THE
MANDATE

*District Judge of the Northern District of Alabama, sitting by designation.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-295

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,
Petitioners

v.

JOSEPH TERRELL, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 7, 1981

/s/ BYRON R. WHITE

Associate Justice of the Supreme Court of the United States

Dated this 9th
day of October, 1981

APPENDIX F

[19 NLRB, at 1016(No. 102)]

In the Matter of UNITED STATES PIPE & FOUNDRY COMPANY *and* STEEL WORKERS ORGANIZING COMMITTEE

Case No. R-1651.—Decided January 29, 1940

Cast Iron Pipe Manufacturing Industry—Investigation of Representatives: controversy concerning representation of employees: rival organizations; controversy as to appropriate unit—*Unit Appropriate for Collective Bargaining:* controversy as to craft units or unit of production and maintenance employees, exclusive of supervisory and clerical employees; desires of employees to determine—*Elections Ordered:* five separate elections to determine appropriate unit or units and representatives thereof.

Mr. Clarence D. Musser and *Mr. Alexander E. Wilson, Jr.*, for the Board.

Mr. Jelks H. Cabaniss, of Birmingham, Ala., for the Company.

Mr. Yelverton Cowherd and *Mr. Noel R. Beddow*, of Birmingham, Ala., for the S. W. O. C.

Mr. J. A. Lipscomb, of Bessemer, Ala., *Mr. M. P. Cushing*, of Birmingham, Ala., and *Mr. George Q. Lynch*, of Washington, D. C., for the P. M. A.

Mr. Shelley Walden, of Cincinnati, Ohio, for the I. M. U.

Mr. J. D. Baumgardner, of Birmingham, Ala., and *Mr. David Kaplan*, of Washington, D. C., for the I. A. M.

Mr. Arthur P. Smith, of Birmingham, Ala., for the Boilermakers.

Mr. J. R. May, of Birmingham, Ala., and *Mr. Lawson Wimberly*, of Washington, D. C., for the I. B. E. W.

Mr. Ivar Peterson, of counsel to the Board.

[19 NLRB, at 1016-7]

DECISION

AND

DIRECTION OF ELECTIONS

STATEMENT OF THE CASE

On June 22, 1939, Steel Workers Organizing Committee, herein called the S. W. O. C., filed with the Regional Director for the Tenth Region (Atlanta, Georgia) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of United States Pipe & Foundry Company, Bessemer, Alabama, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On November 13, [19 NLRB, at 1017] 1939, the National Labor Relations Board, herein called the Board, acting pursuant to Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 2, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On November 22, 1939, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, the S. W. O. C., and upon the following labor organizations claiming to represent employees directly affected by the investigation: International Molders' Union of North America, herein called the I. M. U.; International Brotherhood of Electrical Workers, Local No. 698, herein called the I. B. E. W.; International Association of Machinists, Lodge No. 359, herein called the I. A. M.; International Brotherhood of Boilermakers, Iron Ship Builders, Welders and Helpers of America,

Local No. 4, herein called the Boilermakers; Pattern Makers Association of Birmingham, Alabama, herein called the P. M. A.; and Stenographers, Typists, Bookkeepers and Assistants Union, Local No. 19403. Pursuant to the notice, a hearing was held on December 1, 4, 5, and 6, 1939, at Birmingham, Alabama, before E. G. Smith, the Trial Examiner duly designated by the Board. The Board, the Company, the S. W. O. C., and the P. M. A. were represented by counsel; the I. M. U., the I. B. E. W., the I. A. M., and the Boilermakers, by their duly authorized representatives. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On December 21, 1939, oral argument was had before the Board in Washington, D. C. The I. A. M., the P. M. A., and the I. B. E. W. were represented by counsel, and the I. M. U. by one of its officers. Briefs were filed by the P. M. A. and the I. B. E. W., which have been considered by the Board.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company

United States Pipe & Foundry Company, a New Jersey corporation, is engaged in the manufacture and sale of

[19 NLRB, at 1017-8]

cast-iron pipe, special foundry castings, and special machinery at its plant in Bessemer, Alabama. About 90 per cent of the raw materials used in the opera- [19 NLRB, at 1018] tions at the Bessemer plant, consisting chiefly of pig iron, cast iron, scrap, and coke, are purchased in the State of Alabama. About 90 per cent of the products manufactured at the Bessemer plant, having an annual value of about $1,000,000, are sold and distributed outside the State of Alabama. The Company normally employs at the Bessemer plant about 700 production and maintenance employees and about 40 clerical and supervisory employees. For the purposes of this proceeding, the Company admits that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATIONS INVOLVED

Steel Workers Organizing Committee is a labor organization authorized to act on behalf of Amalgamated Association of Iron, Steel and Tin Workers of North America for collective bargaining purposes.

Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, herein called the Amalgamated, is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership production and maintenance employees at the Company's Bessemer plant, exclusive of supervisory and clerical employees.

International Association of Machinists, Lodge No. 359, is a labor organization affiliated with the American Federation of Labor, admitting to membership white employees at the Bessemer plant engaged as machinists, apprentice machinists, machinsts' helpers, blacksmiths, welders, and handymen.

International Brotherhood of Electrical Workers, Local No. 698, is a labor organization affiliated with the American Federation of Labor, admitting to membership electricians at the Company's Bessemer plant.

International Brotherhood of Boilermakers, Iron Ship Builders, Welders and Helpers of America, Local No. 4, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees at the Bessemer plant engaged as boilermakers, boilermakers' helpers, welders, apprentice welders, and welders' helpers.

Pattern Makers Association of Birmingham, Alabama, an affiliate of Pattern Makers League of North America, is a labor organization affiliated with the American Federation of Labor, admitting to membership pattern makers and pattern makers' apprentices employed at the Company's Bessemer plant.

International Molders' Union of North America is a labor organization affiliated with the American Federation of Labor having jurisdiction over "all workers engaged in the production of castings." Local No. 342 of the I. M. U. is a labor organization admitting to mem-
[19 NLRB, at 1019] bership all employees of the Company's Bessemer plant, excluding supervisory and clerical employees and employees eligible to membership in the foregoing four organizations affiliated with the American Federation of Labor.

III. THE QUESTION CONCERNING REPRESENTATION

On April 14, 1938, the Company entered into an agreement with the I. A. M., the I. B. E. W., the Boilermakers, the P. M. A., and the I. M. U., recognizing each of the

foregoing organizations as the collective bargaining representative of its members employed in the Bessemer plant. The agreement is for no definite period but provides that "if any changes in these rules and regulations are desired by either Company or employee, written notice shall be given and conference on such change shall be held within thirty (30) days thereafter." In June 1939, representatives of the S. W. O. C., claiming to represent a majority of the employees at the Bessemer plant, sought recognition. The Company took the position that in view of the above-mentioned agreement, the uncertainty as to the appropriate unit or units, and the conflicting claims of representation, it would not recognize any union as the exclusive representative of any group of employees until the matter had been decided by the Board.

We find that a question has arisen concerning representation of employees of the Company.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT OR UNITS

The Amalgamated, through the S. W. O. C., contends that all production and maintenance employees at the Bessemer plant, exclusive of supervisory and clerical

employees, constitute a unit appropriate for the purposes of collective bargaining.

The I. A. M. claims that an appropriate unit consist of machinists, apprentice machinists, and machinists' helpers. The I. A. M. would include within its unit employees classified on the November 18, 1939, pay roll as toolmen, crane hookers, blacksmith-shop employees, welders, apprentice welders, and welders' helpers. Most of these employees are [19 NLRB, at 1020] employed in the machine shop, in the tools, repairs, and replacements department, in the repairs, machinery, and equipment department, and in the blacksmith shop. Although the I. A. M. does not admit colored employees to membership, it made no claim that such employees be excluded from the unit it claimed to be appropriate. We shall include colored employees in the unit sought by the I. A. M.[1]

The I. B. E. W. claims that the electricians constitute an appropriate unit. On the November 18, 1939, pay roll 12 employees are classified as electricians.

The Boilermakers contends that an appropriate unit would consist of employees employed as boilermakers, boilermakers' helpers, welders, apprentice welders, and welders' helpers. One boilermaker and two boilermakers'

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[1] *Matter of American Tobacco Company, Incorporated, Richmond Smoking Branch and Committee for Industrial Organization, Local No. 472*, 9 N. L. R. B. 579; *Matter of Floyd A. Fridell, individually and trading as Carolina Marble & Granite Works* and *Granite Cutters' International Association of America, Charlotte Branch*, 11 N. L. R. B. 249; *Matter of Interstate Granite Corporation* and *Granite Cutters' International Association of America, Charlotte Branch*, 11 N. L. R. B. 1046.

helpers are listed on the November 18, 1939, pay roll as being employed in the boiler shop; two boilermakers are employed in the repairs, machinery, and equipment department.

The P. M. A. claims that the pattern makers and pattern makers' apprentices constitute an appropriate unit. The November 18, 1939, pay roll listed nine employees in the pattern shop within the above classifications.

The I. M. U. claims that all employees of the Company, excluding supervisory and clerical employees and those employees claimed by the other four American Federation of Labor unions, constitute an appropriate unit.

The claims of the five American Federation of Labor unions as to the appropriate units do not conflict except in the case of the welders, apprentice welders, and welders' helpers, who are claimed by both the I. A. M. and the Boilermakers. The record reveals, however, that the conflict as to these employees is the result if inadvertence rather than active dispute. The representative of the I. A. M. testified that welders were eligible to membership in either the I. A. M. or the Boilermakers and that for some time it had been customary for welders to affiliate with the I. A. M. Three welders and one apprentice welder are employed in the boiler shop; one welder and three apprentice welders are employed in the repairs, machinery, and equipment department; the number of welders' helpers in either department does not appear, since the pay roll does not contain such classification. Although the record is not clear as to the difference in functions, if any, between welders in these two departments, it appears that the welders in the boiler shop are

more closely identified with the boilermakers, whereas the welders in the repairs, machinery, and equipment department are more [19 NLRB, at 1021] closely identified with the machinists. We conclude, therefore, that the welders, apprentice welders, and welders' helpers in the boiler shop should be included in the unit claimed by the Boilermakers and that such employees in the repairs, machinery, and equipment department should be included in the unit claimed by the I. A. M.

Prior to 1934 the P. M. A., the I. A. M., and the I. M. U. had represented the pattern makers, machinists, and molders, respectively, employed by the Company, and these three organizations had negotiated with the Company on behalf of such employees, with regard to grievances, wages, hours, and other working conditions. No contracts resulted from these negotiations. In 1934 the Company negotiated with an American Federation of Labor federal local union, which embraced employees other than those within the jurisdiction of the three organizations above mentioned. As a result of the 1934 negotiations, the Company promulgated certain working rules and regulations applicable to all employees. In 1935 the federal local union was absorbed by the I. M. U., which in 1934 had extended its jurisdiction to include all workers employed in the production of castings. The 1934 rules and regulations were, in substance, renewed by the Company in 1935 and 1936, after negotiations with a committee of employees and representatives of the P. M. A., the I. A. M., and the I. M. U. None of the foregoing negotiations resulted in a contract nor was any union formally recognized as the representative of any employees.

[19 NLRB, at 1021-2]

Following negotiations with representatives of the five American Federation of Labor unions, the Company entered into the agreement of April 14, 1938, referred to above, recognizing each union as the collective bargaining representative of its members employed at the Bessemer plant. The agreement, which is for no definite period but is subject to change upon 30 days' notice, provides for the 8-hour day and 40-hour week, seniority, overtime, holidays, and grievance procedure. It contains no terms as to wages, but provides that the Company "will meet with the Shop Committee or representatives as the employees may from time to time determine in regard to wages, hours, and working conditions whenever necessary."

The S. W. O. C. began organizing the Company's employees in December 1938. Lodge No. 2140 of the Amalgamated was chartered in June 1939. During a strike at the plant in June 1939, called by the I. M. U. in order to induce the colored I. M. U. members to reinstate [2] with the I. M. U., the representatives of the S. W. O. C., claiming to represent the delinquent I. M. U. members, sought to effect a settlement of the dispute.

[22 NLRB Cases, at 1022]

The Bessemer plant consists of several departments, which are closely interrelated in the production process and through which most of the products flow in the course of production. A tie-up in any department would substantially hamper or curtail the operation of the entire plant.

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[2] The I. M. U. constitution provides that a "suspended member upon payment of all his indebtedness to the Financial Secretary stands reinstated."

In view of the facts set forth above, it appears that the Company's production and maintenance employees can be considered either as a single unit appropriate for the purposes of collective bargaining as claimed by the Amalgamated, or as five separate units as contended by the American Federation of Labor unions. In accordance with our usual practice in this type of case, we hold that the determining factor is the desire of the employees themselves.[3]

As stated in Section VI below, however, the record is inconclusive as to the desire of the employees. We shall, therefore, direct that five separate elections by secret ballot be held. Upon the results of such elections will depend the determination of the appropriate unit or units.

VI. THE DETERMINATION OF REPRESENTATIVES

The I. A. M. introduced in evidence a petition, dated November 29, 1939, bearing 73 signatures, reciting that the signers were members of the I. A. M. and employees of the Company.

The I. B. E. W. presented evidence, by the testimony of its financial secretary and a statement signed by the 12 electricians employed at the Bessemer plant, that it had been designated and selected by such employees as their representative.

The Boilermakers presented evidence that nine of the employees in the unit it claims to be appropriate were members of that organization.

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[3] *Matter of The Globe Machine and Stamping Co.* and *Metal Polishers Union Local No. 3; International Association of Machinists, District No. 54*, 3 N. L. R. B. 294, and subsequent cases.

[19 NLRB, at 1022-3]

The P. M. A. introduced in evidence a statement signed by eight employees within the unit claimed by the P. M. A. authorizing the P. M. A. to act as their collective bargaining representative.

The financial secretary of the I. M. U. testified that a large portion of the 638 members of Local No. 342 were employed at the Company's Bessemer plant. He further testified, however, that about 250 employees who had been reinstated by the I. M. U. as a result of the June 1939 strike had since that time become delinquent in the payment of dues.

At the hearing the Amalagamated submitted for the inspection of the Trial Examiner about 424 membership application cards. The financial secretary of Amalgamated Lodge No. 2140 testified that 478 employees of the Company had signed such cards. Although the [19 NLRB, at 1023] financial secretary testified that no pattern makers, boilermakers, machinists, electrical workers, or molders were members of the Amalgamated, Noel Beddow, the executive director of District 3 of the S. W. O. C., testified that, with the exception of pattern makers, many employees within such classifications had expressed a desire to be represented by the Amalgamated but had refrained from joining because of fear of threats and reprisals.

Under these circumstances, we conclude that elections are necessary to resolve the question of bargaining representative or representatives as well as the question of the appropriate unit or units. Balloting shall be conducted as follows:

1. Among the employees within the classifications claimed by the I. A. M. to constitute an appropriate unit,

but excluding welders, apprentice welders, and welders' helpers in the boiler shop, to determine whether they desire to be represented by the I. A. M., by the Amalgamated, or by neither.

2. Among the electricians to determine whether they desire to be represented by the I. B. E. W., by the Amalgamated, or by neither.

3. Among employees within the classifications claimed by the Boilermakers to constitute an appropriate unit, but excluding welders, apprentice welders, and welders' helpers in the repairs, machinery, and equipment department, to determine whether they desire to be represented by the Boilermakers, by the Amalgamated, or by neither.

4. Among the pattern makers and pattern makers' apprentices to determine whether they desire to be represented by the P. M. A., by the Amalgamated, or by neither.

5. Among all remaining production and maintenance employees, exclusive of supervisory and clerical employees, to determine whether they desire to be represented by the I. M. U., by the Amalgamated, or by neither.

In the event that a majority of the employees voting in one of these groups choose the Amalgamated, all employees within that group will be combined with employees within any other groups which similarly choose the Amalgamated, to constitute a single unit for purposes of collective bargaining. Thus, if the Amalgamated is accorded a majority on each of the five ballots, there will be a single appropriate unit. Wherever a ballot results in a majority for one of the unions other than the Amalga-

[19 NLRB, at 1023-4]

mated, employees within the classifications covered by that ballot will constitute a separate unit for the purposes of collective bargaining.

For the purpose of determining eligibility to vote, we shall direct the use of the Company's last regular pay roll immediately preceding this Direction of Elections, including employees who did not work during such pay-roll period because they were ill or on vacation, but [19 NLRB, at 1024] excluding those employees who have since quit or who have been discharged for cause.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusion of Law

A question affecting commerce has arisen concerning the representation of employees of United States Pipe & Foundry Company, Bessemer, Alabama, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

DIRECTION OF ELECTIONS

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 2, it is hereby

Directed that, as part of the investigation authorized by the Board to ascertain representatives for collective bargaining with United States Pipe & Foundry Company, Bessemer, Alabama, separate elections by secret ballot shall be conducted as early as possible but not later than

thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Tenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among those employees of the United States Pipe & Foundry Company, Bessemer, Alabama, plant, who fall within the five groups described below who were on the Company's last regular pay roll immediately preceding the date of this Direction, including employees who did not work during such payroll period because they were ill or on vacation, and employees who were then or have since been temporarily laid off, but excluding supervisory and clerical employees and those who have since quit or who have been discharged for cause:

(a) All machinists, apprentice machinists, toolmen, crane hookers, blacksmith-shop employees, machinists' helpers, and the welders, apprentice welders, and welders' helpers in the repairs, machinery, and equipment department, to determine whether they desire to be represented by International Association of Machinists, Lodge No. 359, or by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, for the purposes of collective bargaining, or by neither;

(b) All electricians to determine whether they desire to be represented by International Brotherhood of Electrical Workers, Local [19 NLRB, at 1025] No. 698, or by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, for the purposes of collective bargaining, or by neither;

[19 NLRB, at 1025]

(c) All boilermakers and boilermakers' helpers, and the welders, apprentice welders, and welders' helpers in the boiler shop, to determine whether they desire to be represented by International Brotherhood of Boilermakers, Iron Ship Builders, Welders and Helpers of America, Local No. 4, or by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, for the purposes of collective bargaining, or by neither;

(d) All pattern makers and pattern makers' apprentices, to determine whether they desire to be represented by Pattern Makers Association of Birmingham, Alabama, or by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, for the purposes of collective bargaining, or by neither;

(e) All remaining production and maintenance employees to determine whether they desire to be represented by International Molders' Union of North America, Local No. 342, or by Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, for the purposes of collective bargaining, or by neither.

MR. EDWIN S. SMITH, concurring:

Although the 1938 contract between the Company and the five American Federation of Labor unions was jointly negotiated and provided for general conditions applicable to all employees, I concur in the decision. The record shows that the P. M. A., the I. A. M., and the I. M. U. had negotiated separately with the Company prior to 1938. The contract entered into in 1938, more than a year before the S. W. O. C. sought to represent any employees,

while jointly negotiated,[4] was so framed as to recognize the separate identity of the five crafts and contemplated the presentation of grievances by the respective unions for their members. For these reasons, I concur in the determination that the craft groups should be given an opportunity to vote either to retain their separate bargaining status or to merge into one industrial unit.[5]

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[4] Representatives of each of the five unions participated in the negotiations and the contract was signed separately by them on behalf of their respective union.

[5] See my concurring opinions in *Matter of American Hardware Corporation* and *United Electrical and Radio Workers of America*, 4 N. L. R. B. 412; *Matter of Vultee Aircraft Division, Aviation Manufacturing Corporation* and *United Automobile Workers of America, Local 361*, 9 N. L. R. B. 32; *Matter of The William Powell Company* and *Pattern Makers Association of Cincinnati*, 12 N. L. R. B. 115.

APPENDIX G

[21 NLRB 671 (No. 67)]

In the Matter of UNITED STATES PIPE & FOUNDRY COMPANY *and* STEEL WORKERS ORGANIZING COMMITTEE

Case No. R–1651

SUPPLEMENTAL DECISION

AND

CERTIFICATIONS OF REPRESENTATIVES

March 16, 1940

On January 29, 1940, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in the above-entitled proceedings. Pursuant to the Direction of Elections, elections by secret ballot were conducted on February 13, 1940, under the direction and supervision of the Regional Director for the Tenth Region (Atlanta, Georgia). On February 16, 1940, the Regional Director, acting pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, issued and duly served upon the parties an Election Report. No objections to the conduct of the ballot or the Election Report have been filed by any of the parties.

As to the balloting and its results, the Regional Director reported as follows:

MACHINISTS GROUP

Total number eligible	110
Total ballots cast	105
Total number ballots cast for the International Association of Machinists Lodge No. 359, affiliated with the American Federation of Labor	85

[1] 19 N. L. R. B. 1016.

[21 NLRB, at 671]

Total number ballots cast for the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, affiliated with Congress of Industrial Organizations	19
Total number votes cast for neither organization	0
Total number of challenged ballots	1
Total number of void ballots	0
Total number of blank ballots	0

[21 NLRB, at 672]

ELECTRICIANS GROUP

Total number eligible	12
Total ballots cast	12
Total number ballots cast for the International Brotherhood of Electrical Workers, Local No. 698, affiliated with American Federation of Labor	12
Total number ballots cast for the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, affiliated with Congress of Industrial Organizations	0
Total number votes cast for neither organization	0
Total number of challenged ballots	0
Total number of void ballots	0
Total number of blank ballots	0

BOILERMAKERS GROUP

Total number eligible	12
Total ballots cast	11
Total number ballots cast for the International Brotherhood of Boilermakers, Iron Ship Builders, Welders and Helpers of America, Local No. 4, affiliated with American Federation of Labor	11

[21 NLRB, at 672-3]

Total number ballots cast for the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, affiliated with Congress of Industrial Organizations	0
Total number votes cast for neither organization	0
Total number of challenged ballots	0
Total number of void ballots	0
Total number of blank ballots	0

PATTERN MAKERS GROUP

Total number eligible	9
Total ballots cast	9
Total number ballots cast for the Pattern Makers Association of Birmingham, Ala., affiliated with Pattern Makers League of North America, affiliated with American Federation of Labor	9
Total number ballots cast for the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, affiliated with Congress of Industrial Organizations	0
Total number votes cast for neither organization	0
Total number of challenged ballots	0
Total number of void ballots	0
Total number of blank ballots	0

[21 NLRB, at 673]

ALL REMAINING PRODUCTION AND MAINTENANCE EMPLOYEES

Total number eligible	624
Total ballots cast	566
Total number ballots cast for the International Molders Union of North America, Local No. 342, affiliated with American Federation of Labor	126

[21 NLRB, at 673]

Total number ballots cast for the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, affiliated with Congress of Industrial Organizations	414
Total number votes cast for neither organization	15
Total number of challenged ballots	11
Total number of void ballots	0
Total number of blank ballots	0

In the Decision and Direction of Elections above referred to, we stated that upon the results of the elections would rest the determination of the unit or units appropriate for the purposes of collective bargaining. The Board said: "In the event that a majority of the employees voting in one of these groups choose the Amalgamated, all employees within that group will be combined with employees within any other groups which similarly choose the Amalgamated, to constitute a single unit for purposes of collective bargaining. Thus, if the Amalgamated is accorded a majority on each of the five ballots, there will be a single appropriate unit. Wherever a ballot results in a majority for one of the unions other than the Amalgamated, employees within the classifications covered by that ballot will constitute a separate unit for the purposes of collective bargaining."

Upon the entire record in the case, the Board makes the following:

Supplemental Findings of Fact

We find that each of the following five groups of employees, excluding supervisory and clerical employees, employed by United States Pipe & Foundry Company

at its Bessemer, Alabama, plant, constitutes a unit appropriate for the purposes of collective bargaining, and that said units will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise will effectuate the policies of the Act:

(a) Machinists, apprentice machinists, toolmen, crane hookers, blacksmith-shop employees, and the welders, apprentice welders, and welders' helpers in the repairs, machinery, and equipment department;

(b) Electricians;

[21 NLRB, at 674]

(c) Boilermakers and boilermakers' helpers, and the welders, apprentice welders, and welders' helpers in the boiler shop;

(d) Pattern makers and pattern makers' apprentices; and

(e) All remaining production and maintenance employees.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Supplemental Conclusions of Law

1. Machinists, apprentice machinists, toolmen, crane hookers, blacksmith-shop employees, and the welders, apprentice welders, and welders' helpers in the repairs, machinery, and equipment department, employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

[21 NLRB, at 674]

2. Electricians employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

3. Boilermakers and boilermakers' helpers, and the welders, apprentice welders, and welders' helpers in the boiler shop, employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

4. Pattern makers and pattern makers' apprentices employed by United States Pipe & Foundry Company, at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

5. All remaining production and maintenance employees employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

CERTIFICATIONS OF REPRESENTATIVES

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 8 and 9, of National Labor Relations Board

Rules and Regulations—Series 2, as amended,
[21 NLRB, at 675]

IT IS HEREBY CERTIFIED that International Association of Machinists Lodge No. 359, has been designated and selected by a majority of the machinists, apprentice machinists, toolmen, crane hookers, blacksmith-shop employees, and the welders, apprentice welders, and welders' helpers in the repairs, machinery, and equipment department, employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, International Association of Machinists, Lodge No. 359, is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment; and

IT IS HEREBY CERTIFIED that International Brotherhood of Electrical Workers, Local No. 698, has been designated and selected by a majority of the electricians employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, International Brotherhood of Electrical Workers, Local No. 698, is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment; and

IT IS HEREBY CERTIFIED that International Brotherhood of Boilermakers, Iron Ship Builders, Welders and Helpers of America, Local No. 4, has been designated

[21 NLRB, at 675-6]

and selected by a majority of the boilermakers and boilermakers' helpers, and the welders, apprentice welders, and welders' helpers in the boiler shop, employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, International Brotherhood of Boilermakers, Iron Ship Builders, Welders and Helpers of America, Local No. 4, is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment; and

IT IS HEREBY CERTIFIED that Pattern Makers Association of Birmingham, Alabama, has been designated and selected by a majority of the pattern makers and pattern makers' apprentices employed by United States Pipe & Foundry Company at its Bessemer, Alabama, plant, excluding supervisory and clerical employees, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, Pattern Makers Association of Birmingham, Alabama, is the exclusive representative of all such employees [21 NLRB, at 676] for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment; and

IT IS HEREBY CERTIFIED that Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, has been designated and selected by a majority of the remaining production and maintenance employees employed by United States Pipe & Foundry Company at

its Bessemer, Alabama, plant, excluding supervisory and clerical employees, as their representative for the purposes of collective bargaining and that, pursuant to Section 9 (a) of the Act, Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 2140, through Steel Workers Organizing Committee, is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

APPENDIX H

84 NLRB 954 (No. 105)

In the Matter of UNITED STATES PIPE AND FOUNDRY COMPANY, EMPLOYER *and* INTERNATIONAL MOLDERS AND FOUNDRY WORKERS UNION OF NORTH AMERICA, AFL, PETITIONER

Case No. 10–RC–566.—Decided June 30, 1949

DECISION

AND

DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before Herman Corenman, hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Gray].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.

2. The Petitioner and Local 2140, United Steelworkers of America, CIO, herein called the Intervenor, are labor organizations claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9 (c) and Section 2 (6)

[84 NLRB, at 954-5]

and (7) of the Act.[1]

4. The appropriate unit; the determination of representatives:

Since 1940,[2] the Intervenor has represented and bargained for a re- [84 NLRB, at 955] sidual production and maintenance unit, presently comprising approximately 700 out of a total of approximately 1,050 production and maintenance employees,[3] at the Employer's Bessemer, Alabama, plant. The Petitioner seeks to sever therefrom a unit of molders, coremakers, and their apprentices,

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[1] The Intervenor contends that a contract executed between it and the Employer on February 19, 1946, as supplemented, amended, and extended, constitutes a bar to a present election. The most recent amendment, executed September 4, 1948, extended the termination date of the contract from April 30, 1949, to July 16, 1950.

The record discloses that the contract provided among other things for maintenance of membership in the Intervenor. However, the Intervenor has not been certified by the Board pursuant to Section 9 (e) (1) of the Act as being authorized to execute such a union-security provision, and the agreement was extended after the effective date of the amended Act. For this reason, and without regard to any other considerations, we find that the contract cannot serve as a bar to a present determination of representatives. *Matter of General Electric Company*, 80 N. L. R. B. 169.

[2] See *Matter of United States Pipe & Foundry Company*, 19 N. L. R. B. 1016, 21 N. L. R. B. 671. The question of a separate unit for molders, coremakers, and their apprentices, was not litigated in this proceeding. Collective bargaining agreements, the most recent of which will not expire until July 16, 1950, have been executed with respect to this unit between the Intervenor and the Employer.

[3] The remaining production and maintenance employees are, as a result of the earlier decision (footnote 2, *supra*), represented by other unions in craft or departmental units.

employed in the special foundry at that plant.[4] The Intervenor opposes such severance on the basis of the bargaining history; the Employer takes no position with respect to the appropriate unit.

In addition to the foundry, in which it manufactures cast iron fittings, sugar house machinery, and various types of special castings, the Employer operates a pipe shop, in which it manufactures cast iron pressure pipe.[5] The foundry is housed in a separate building from the pipe shop. Molders, coremakers, and their apprentices are employed only in the foundry. The molders and coremakers are highly skilled mechanics who are required by the Employer to undergo a 4-year apprenticeship before being qualified for their positions.[6] With the exception of the crane operators, they are the only skilled employees who work exclusively in the foundry.[7] No other employees in the plant possess comparable skills or duties, and there is no interchange between these employees and other employees in the plant.

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[4] The unit sought by the Petitioner includes approximately 43 out of the approximately 146 employees in the special foundry. The other job classifications employed in the foundry are crane operators, hookers and helpers (to molders and coremakers), laborers, shop cleaners, cupola men, oven firemen, utility men, chippers, cement liners, sand cutters, and sand mixers.

[5] The Intervenor's unit includes employees in both the foundry and the pipe shop.

[6] The Petitioner's proposed unit includes three apprentices. The Employer's molders and coremakers have either previously served their apprentiveship with the Employer or have been hired as qualified journeymen.

[7] Skilled maintenance employees who work in the foundry also work in the pipe shop.

[84 NLRB, at 955-6]

Accordingly, on the basis of the foregoing and on the entire record, we find that the molders and coremakers employed in the special foundry at the Employer's Bessemer, Alabama, plant, constitute a homogenous group of skilled craftsmen who, with their apprentices, may, within the meaning of Section 9 (b) of the Act, constitute a separate unit appropriate for the purpose of collective bargaining.[8] Accordingly, we shall make no final unit determination at this time, but shall [84 NLRB, at 956] first ascertain the desires of these employees, as expressed in the election which we shall direct be conducted among:

All molders, molders' apprentices, coremakers, and coremakers' apprentices, excluding supervisors as defined in the Act, employed at the Employer's Bessemer, Alabama, plant. If a majority of the employees in the voting group select the Petitioner, they will be deemed to have indicated their desire to be represented in a separate appropriate unit.

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[8] See, for example, *Matter of Texas Foundries, Inc.*, 83 N. L. R. B. 679; *Matter of Charles Binns et al., d/b/a Binns Passaic Iron & Brass Foundry*, 77 N. L. R. B. 380. The Board has consistently, in the face of a contrary bargaining history, directed separate self-determination elections among groups of craft employees such as these, or among departmental groups with such a craft nucleus. See *Matter of The Fayscott Corporation*, 78 N. L. R. B. 1256. *Matter of The John Deere Dubuque Tractor Works*, 77 N. L. R. B. 1424. Cf. *Matter of Sacks-Barlow Foundries, Inc.*, 79 N. L. R. B. 327, in which the Board dismissed a petition seeking a unit which was neither departmental in scope nor a craft group.

[84 NLRB, at 956]

DIRECTION OF ELECTION

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations — Series 5, as amended, among the employees in the voting group described in paragraph numbered 4, above, who were employed during the pay-roll period immediately preceding the date of this Direction of Election, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by International Molders and Foundry Workers Union of North America, AFL.[9]

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[9] As the Intervenor has not complied with the requirements of Section 9 (f), (g), and (h) of the Act, it will not be accorded a place on the ballot.

APPENDIX I

October 20, 1950

International Association of Machinists,
Lodge No. 359,
P. O. Box 902,
Birmingham, Alabama.

Attention: Mr. J. D. Baumgardner, Business Representative

Gentlemen:

We have heretofore discussed with you the confusion at our Bessemer Plant due to the fact that some employees are now bargained for by the union although belonging and paying dues to another and the further fact that other employees, while now bargained for by one union regardless of the payment of dues, should more appropriately be bargained for by another union. We have heretofore suggested that by agreement between the company and all the interested unions, and with the approval of each employee concerned, this confusion can be eliminated.

Attached hereto is a list by departments of our Plant showing the present bargaining representative of different employees in each such department, and showing the transfers which we are proposing to you and to the other interested unions.

The net result of the proposed transfers in so far as concerns increases and decreases in the various bargaining units will be as follows:

Steelworkers—22 men will be transferred to the machinists union, and 3 men will be transferred to the boilermakers union.

Machinists—9 men will be transferred to the steelworkers union.

Boilermakers—6 men will be transferred to the steelworkers union.

Steelworkers net loss: 11 men
Machinists net gain: 13 men
Boilermakers net loss: 3 men

(Page 2 of 3 pages)

We have contacted each individual employee who is proposed to be transferred from one bargaining unit to another and have explained the situation to each one of them and each one of them has consented and agreed to the transfers which we are proposing. Therefore, if the Steelworkers, Machinists and Boilermakers unions respectively all agree there will be no difficulty in our eliminating this unfortunate situation that now exists.

We assume that when everyone has agreed it will be appropriate for your union to surrender to us for cancellation checkoff cards signed by your men who are being transferred from your union to another bargaining unit and that, in like manner, we will obtain cancellation of checkoff cards signed by those men being transferred to your unit and that you will obtain and present to us new checkoff cards signed by the men so being transferred to your unit.

If you approve the proposed transfer, please indicate that fact on the carbon copy of this letter which is enclosed, and upon our receiving like approval from the other two interested unions we will make the changes effective as fo the 1st day of November, 1950, or as soon thereafter as other approvals can be obtained; furthermore, when the present contract expires and is re-written

the changes and/or transfers made in this letter will be clarified and written into the next agreement.

Yours very truly,

/s/ A. B. NOLAN
Personnel Director

/s/ J. S. BRIDGES
Resident Manager

ACCEPTED:

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE NO. 359

By: /s/ J. D. BAUMGARDNER

/s/ D. T. FAUST

/s/ J. W. DORSEY

/s/ T. R. RICKETT

No. of Employees	Department	Classification	Certified Union	Transferred To
6	deLavaud--Machining Products	Machine Operators Pipe Cutters (Should be classified as Machine Operators)	Steelworkers	Machinists
3	Machining #1 Pit Products	Machine Operators	Steelworkers	Machinists
2	Machining #3 Pit Products	Machine Operators	Steelworkers	Machinists
5	Machine Shop	Crane Operators	Steelworkers	Machinists
3	Tools, Repair, Replacement	Flank Patcher #1 Flank Patcher #2 Trainee	Could be interpreted as Steelworkers	Boilermakers
5	Machine Shop	Crane Followers (Hookers)	Machinists	Steelworkers
4	Blacksmith	Helpers	Machinists	Steelworkers
6	Boilermakers	Boilermaker Helpers	Boilermakers	Steelworkers
2	deLavaud RME	Helpers (White) To be promoted to Millwright Trainees	Steelworkers	Machinists
3	Repairs to Machinery and Equipment	Millwright Helpers (White) To be promoted to Millwright Trainee	Steelworkers	Machinists

(Page 3 of 3 pages)

SUMMARY

Steelworkers–
23 men will be transferred to the Machinists
3 men will be transferred to the Boilermakers
NET LOSS–11 men

Machinists–
9 men will be transferred to Steelworkers
NET GAIN–14 men

Boilermakers–
6 men transferred to Steelworkers
NET LOSS 3 men

APPENDIX J

[Filed in Clerk's Office, Northern District of Alabama, Jan. 14, 1980. James E. Vandegrift, Clerk, United States District Court. By: Linda P. Clark.]

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

JOSEPH TERRELL, JR., et al., *Plaintiffs,* vs. UNITED STATES PIPE AND FOUNDRY COMPANY, et al., *Defendants.*	NO. CA 72-P-0887-S

RULE 54(b) CERTIFICATE

With respect to the dismissal of the plaintiffs' claims pursuant to the Memorandum of Opinion issued on October 16, 1979 against Local 2140, United Steelworkers of America, Local 342, International Molders and Allied Workers Union, Patternmakers Association of Birmingham, United Steelworkers of America, International Molders and Allied Workers Union, Patternmakers League of North America, International Association of Machinists and Aerospace Workers, and the Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers, it is CERTIFIED, in accordance with Rule 54(b), Fed. R. Civ. P.:

(1) That the Court has directed the entry of final judgment in favor of each of the defendants listed above; and

(2) That the Court has determined there is no just reason for delay.

/s/ SAM C. POINTER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX K

[Filed in Clerk's Office, Northern District of Alabama, Jan. 14, 1980. James E. Vandegrift, Clerk, United States District Court. By: Linda P. Clark.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOSEPH TERRELL, JR., et al., *Plaintiffs,* vs. UNITED STATES PIPE AND FOUNDRY COMPANY, et al., *Defendants.*	CIVIL ACTION NO. 72-887

JUDGMENT

A Memorandum Opinion having been entered on October 16, 1979, which denied all the claims which the plaintiffs have asserted against Local 2140, United Steelworkers of America, Local 342, International Molders and Allied Workers Union, Patternmakers Association of Birmingham, United Steelworkers of America, International Molders and Allied Workers Union, Patternmakers League of North America, International Association of Machinists and Aerospace Workers, and the Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers and the Court having entered a Certificate pursuant to Rule 54(b), Fed. R. Civ. P. that there was no just reason for delay and expressly directing the entry of final judgment, it is

ORDERED, ADJUDGED and DECREED that judgment be and it is hereby entered in favor of the above-listed defendants.

/s/ SAM C. POINTER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX L

[Filed in Clerk's Office, Northern District of Alabama, Jan. 14, 1980. James E. Vandegrift, Clerk, United States District Court. By: Linda P. Clark.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOSEPH TERRELL, JR., et al., *Plaintiffs,* vs. UNITED STATES PIPE AND FOUNDRY COMPANY, et al., *Defendants.*	CIVIL ACTION NO. 72-887

ORDER

Pursuant to the Memorandum Opinion entered on October 16, 1979, it is hereby

ORDERED that the claims of the plaintiffs against Lodge 359, International Association of Machinists and Aerospace Workers and Local 583, Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers are dismissed except for any claims which they may have due to their being injured by virtue of jobs not having remained in the seniority units to which they were allocated prior to the 1950 agreements.

/s/ SAM C. POINTER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX M

[Filed in Clerk's Office, Northern District of Alabama, Jan. 14, 1980. James E. Vandegrift, Clerk, United States District Court. By: Linda P. Clark.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOSEPH TERRELL, JR., et al., *Plaintiffs,* vs. UNITED STATES PIPE AND FOUNDRY COMPANY, et al., *Defendants.*	CIVIL ACTION NO. 72-887

CERTIFICATE PURSUANT TO
28 U.S.C. §1292(b)

By Memorandum Opinion entered October 16, 1979 this Court denied plaintiffs' claims that the seniority system was unlawful because "the defendants have met the burden of proving the applicability of 42 U.S.C.A. §2000e2(h)," Slip Opinion, p. 19; that is, the defendants had demonstrated that the seniority system was bona fide and thus lawful pursuant to the standards established in *Teamsters v. United States*, 431 U.S. 32 (1977) and *James v. Stockham Valves and Fittings, Inc.*, 559 F.2d 310 (5th Cir. 1977). "The one exception [to this holding] relates to the transfer of certain jobs in 1950 between seniority units", Slip Opinion, p. 19. It was determined that this exception applied only to a limited portion of the claims which the plaintiffs had brought against two of the de-

fendants, Lodge 359, International Association of Machinists and Aerospace Workers and Local 583, Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers. The major portion of the plaintiffs' claims against Lodge 359, IAM and Local 583, Boilermakers have been denied pursuant to the determination that the seniority system is lawful. Having carefully reviewed this litigation, it is CERTIFIED in accordance with 28 U.S.C. §1292(b):

That the Memorandum Opinion involves a controlling question of law—the legality of the seniority system—as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/ SAM C. POINTER, JR.
UNITED STATES DISTRICT JUDGE

Nos. 81-1029, 81-1118

Office - Supreme Court, U.S.
FILED
JAN 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, LOCAL 342, *et al.*,

Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., *et al.*,

Respondents, Nos. 81-1029
81-1118

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that a seniority system which perpetuates the effects of racial job segregation is unlawful in violation of Title VII of the Civil Rights Act of 1964 because it is not a "bona fide" seniority system where the system severely limited the employment opportunities of black workers, the system was developed by unions with overtly discriminatory practices, the system was gerrymandered in an irrational manner, the development of the system was affected by racial considerations, the historically all-white unions at the plant rejected the bargaining proposals made from 1968 through 1977 by a predominantly black union and the company to institute a seniority system which would end the

racially discriminatory operation of the system, and union officers of the historically all-white unions demonstrated clear racial bias during the period when these unions rejected efforts to establish a nondiscriminatory seniority system.

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Rule 52(a), Federal Rules of Civil Procedure 22

Nos. 81-1029, 81-1118

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, LOCAL 342, et al.,
Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.
Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., et al.,
Respondents, Nos. 81-1029
81-1118

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This fair employment action was filed on October 16, 1972, alleging that United States Pipe and Foundry and 12 unions which represented employees at the Company's

Bessemer, Alabama plant engaged in systematic discrimination in job assignment, training and promotion of black employees in violation of Title VII of the Civil Rights Act of 1964 (as amended 1972) and 42 U.S.C. §1981. On the eve of trial, following extensive discovery, all parties to the litigation agreed upon injunctive relief, including modification of the seniority system at the plant. Also the plaintiffs and the company entered into a separate agreement including the payment of $510,000 in back pay in settlement of all the monetary claims against it by the class members. The plaintiffs also agreed not to seek back pay against the International Brotherhood of Electrical Workers, Local 136.[1/]

1/ Summary Judgment had been granted in favor of the International Brotherhood of Electrical Workers and no appeal was taken from that Judgment.

The issue reserved for trial was the monetary liability of the remaining five international unions and their five locals at the Bessemer plant. The plaintiffs stated that they were not seeking to introduce evidence with the intent of establishing that the United Steelworkers of America and its Local 2140 had liability for back pay. However, the plaintiffs maintained that if the other eight unions, hereinafter referred to collectively as the "AFL" unions,[2/] introduced evidence that demonstrated that the Steelworkers were liable for back pay, then the plain-

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2/ The contested representational elections in the 1940s at the Bessemer plant--which are relevant to the issue presented for review, the legality of the seniority system--involved disputes between unions belonging to the American Federation of Labor and the Steelworkers which belonged to the Congress of Industrial Organizations.

tiffs would request that the Steelworkers be assessed the liability established by the AFL Unions.[3/]

The critical issue raised in the petitions for certiorari filed by the eight AFL Unions[4/] is whether the seniority system to which they were parties was created or maintained with the intention to discriminate. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Black employees had been assigned on the basis of race to poorly paid "dead

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3/ All ten unions were represented by the same counsel in the district court. On appeal in the Fifth Circuit the AFL Unions and the Steelworkers were separately represented.

4/ Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers and its Local 583; International Association of Machinists and Aerospace Workers and its Lodge 359; International Molders and Allied Workers Union and its Local 342; Patternmakers League of North America and its affiliate, Patternmakers Association of Birmingham.

end" jobs. The separate seniority units into which employees were segregated largely coincided with the distinct bargaining units represented by each of the AFL Unions and the Steelworkers. The AFL Unions were virtually all-white whereas the Steelworkers, which represented the poorly paid black workers, was predominantly black. Under the pre-settlement seniority system an employee's seniority was based upon service in a particular department or seniority unit, rather than service at the plant. Since a black worker with years of service in a poorly paid black seniority unit necessarily forfeited his seniority upon transferring to a traditionally white job, the seniority system effectively locked blacks into positions to which they had been assigned

on the basis of race. The plaintiffs alleged that the system was designed and maintained with the purpose of discriminating against black workers.

The district court held that a part of the seniority system was created with an intent to discriminate. The district court determined that the transfer in 1950 of 10 positions staffed by whites from the Steelworkers' unit to the Boilermakers' and Machinists' units in exchange for all of the black workers represented by the Boilermakers and Machinists was "not... rational" and "that inconsistent approaches [were] taken with respect to helper positions - separating some (those with black incumbents) from their related skilled positions, while joining others (those with white incumbents) to their related skilled

positions." App. 19b.[5/] Although finding that the seniority system was "instituted at a time of widespread racial discrimination--in the plant [and] in the unions [footnote omitted]", App. 20b, that "racial considerations were involved in the 1940 [union] elections which produced the bargaining units," App. 20b, and that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 [collective bargaining] negotiations....," App. 23b, the district court concluded that the seniority system -- apart from the 1950 transfers -- was not created or maintained with an intent to discriminate, App. 25b.

The court of appeals ruled that, as a matter of law, the substantial adverse racial effect of the system, the "avowedly

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5/ The reference is to the Appendix to Petition for a Writ of Certiorari, No. 81-1118.

racist policies of the craft [AFL] unions," the genesis of the system in intentional discrimination, and the racially oriented collective bargaining negotiations compelled the conclusion that the seniority system was not bona fide since it resulted from and was continued with the purpose of intentional discrimination. App. 16a-20a. The appellate court held that the Boilermakers, Machinists, Molders, and Patternmakers and their local affiliates were liable for the economic harm suffered by black workers as a consequence of the non-bona fide and illegal seniority system.[6/]

6/ In view of the repeated efforts by the Steelworkers to persuade the company and the AFL Unions to adopt a non-discriminatory seniority system, the court of appeals "absolve[d] the Steelworkers from any responsibility under Title VII for the discriminatory seniority system at the Bessemer plant." App. 24a-25a. Neither the AFL Unions nor the plaintiffs have petitioned this Court to reverse this specific holding.

REASONS FOR DENYING THE WRIT

1. A seniority system which perpetuates the effects of racial job segregation is unlawful if differences in treatment under the system are "the result of an intention to discriminate because of race...." 42 U.S.C. §2000e-2(h). Teamsters, 431 U.S. at 353. This Court has observed that in "[d]etermining whether invidious discriminatory purpose was a motivating

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6/ continued)

The court of appeals further held that only the local unions were named in the original 1969 administrative charges filed with the Equal Employment Opportunity Commission. Thus the court ruled that while the liability of the local unions commenced with the filing of the 1969 charges, the liability of the four international unions commenced with the filing of amended charges in 1973. App. 30a-31a. The plaintiffs have filed a petition for a writ of certiorari, Terrell, et al. v. International Association of Machinists, et al., No. 81-1069, presenting the question of whether the 1969 charges, properly construed, adequately named the international unions.

factor [it is necesssary to make] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Thus, a court's determination of whether an intent to discriminate entered the establishment or maintenance of a seniority system depends upon the particular factual context in a specific plant. The union petitioners essentially argue that the Teamsters standard was improperly applied by the court of appeals to the particular factual context of the Bessemer, Alabama plant of United States Pipe and Foundry Company. The writ of certiorari should not be granted. It is not the role of this Court to sit as a second-tier appellate court "review[ing] the evidence and discuss[ing] specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925).

2. The court of appeals correctly applied the legal standards in determining that "the Bessemer system cannot qualify for the immunity extended by section 703(h) of Title VII only to those seniority systems created and maintained without intention to discriminate." App. 20a-21a. The union petitioners fail to describe adequately the record of intentional discrimination in the creation and maintenance of the system.

a. Origin of the system. The seniority system during the period at issue, from the mid-1960s to the entry of settlement in 1979, was created during the period from 1939 through 1950. The period included two contested bargaining unit elections and a transfer of jobs between

bargaining units. The evidence overwhelmingly demonstrates that the system was created with an intent to discriminate. First, the AFL Unions which were instrumental in the creation of the system were openly racist.

> ...the Machinists barred blacks from union membership. The Boilermakers relegated blacks to inferior "auxiliary" locals, the Molders segregated the few blacks in their Alabama locals, and the Patternmakers claimed that there were no "qualified niggers" in the state.

App. 19a.[7/] Second, the union elections

7/ The district court also found that there was "widespread racial discrimination ... in the [AFL] unions...." App. 16b, 20b. The Boilermakers and Machinists, Petition No. 81-1118, p.7, n.6, wrongly dispute the findings of both lower courts by asserting that the Machinists and Boilermakers had had black members and officers in the 1940s and 1950s. For example, they refer to the testimony of Hembree that he was a local officer in the Boilermakers, apparently in the mistaken belief that Hembree is black. In fact, the transcript indicates that Hembree is white. (June 1979 Trial Transcript, p. 300).

in 1940 "had racial implications." App. 16b. Third, while the National Labor Relations Board included black-held jobs within the bargaining units of the Machinists and Boilermakers, these unions subverted the NLRB certification by failing to represent the black workers.[8/] Fourth, the subversion of the NLRB certification was completed by a 1950 transfer of jobs between the Steelworkers and the boilermakers and Machinists: the trial and appellate courts both held that this transfer was racially motivated, see p. 6, supra.[9/]

8/ At first the Machinists segregated the black workers who attended union meetings and then they told the blacks that "they couldn't represent [blacks]." Transcript, p. 230.

9/ The transfer agreement expressly referred to race--"Millwright Helpers (white)," "Helpers (white)," App. 4i. Nevertheless, the Machinists and Boilermakers contend that the holding by the two

Fifth, in 1949 the Molders petitioned the NLRB to certify a unit composed of the only two jobs in the Foundry department which were staffed exclusively by white workers; the Molders rejected the inclusion of helper positions, staffed by blacks, which were functionally related to the white-only jobs included in the unit. Sixth, the constitutions of the Boilermakers, Machinists and Molders provided for the representation by these unions of workers in helper and related production jobs. However, these unions rejected the inclusion in their bargaining units in the Bessemer plant of helper and related production jobs which were staffed by

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9/ continued

lower courts that the 1950 transfer was racially motivated is a "subsidiary ruling" which requires review. Petition, No. 81-1118, pp. 21-22.

blacks. Seventh, as the district court found, "inconsistent approaches are taken with respect to helper positions....those with white incumbents [unlike those with black incumbents] were joined by the AFL Unions to their related skilled positions." App. 19b.

Finally, as a result of a decade of manipulation, the goal of segregation was attained; after the 1950 job transfers, the bargaining units of the AFL Unions were staffed exclusively by white workers.

b. Maintenance of the System. The racial segregation established by the creation of the seniority system was maintained by the seniority forfeiture or "seniority suicide" provisions in the collective bargaining agreements--if an employee transferred from a job in the unit represented by one union to a job in a unit

represented by another union, he forfeited all his accumulated seniority. In a lay-off he would be the first worker in the unit to lose his job. As both lower courts found, black workers were adversely affected by the seniority system since black workers had been isolated into the lower-paying jobs in departments which provided little opportunity for promotion.[10/]

This racially based and discriminatory seniority system was maintained with an intent to discriminate. App. 18a.[11/] First,

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10/ For example, in 1971 only 4.2% or 11 out of 262 workers in the seniority units represented by the AFL Unions were black, whereas 78.8% or 404 out of 513 workers in the seniority units represented by the Steelworkers were black. Plaintiffs exhibits 28d, 78.

11/ The district court found that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 negotiations concerning the modification of seniority...." App. 236. However, the court concluded that the resistance of the AFL Unions to

in collective bargaining sessions with the AFL Unions during the period from 1968 through 1977, the company proposed modifications in the seniority system which would have reduced or terminated the adverse racial consequences of the system. The AFL Unions adamantly refused any modifications in 1968 and 1971 and agreed to only minor modifications in 1975 and 1977. Second, the Steelworkers in meetings of the union representatives proposed that the unions all agree to a seniority system which would finally end the effects of racial segregation. The Steelworkers' representative testified that the proposal

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11/ continued

change was not based upon intentional discrimination. The district court erred in failing to make "a sensitive inquiry into" the overwhelming circumstantial and direct evidence of discrimination. Arlington Heights, 429 U.S. at 266.

ran into a "brick wall"--the AFL Unions' intransigence. Transcript, pp. 111-12.

Third, during the period when the AFL Unions refused to modify the racially discriminatory seniority system, it was apparent that local union officers were racially biased.[12/] Fourth, at least the Patternmakers violated its own procedures when it failed, as did the other AFL Unions, to agree to any modification of

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12/ In an affidavit submitted in 1969 to the EEOC, the president of Molders Local 362 stated with respect to a black in the union that "[a]s long as he stays in his place, he's alright with me." Plaintiffs' exhibit 70. The president also informed black workers that "[w]e didn't want you all in here to start with" and he refused to represent black workers in grievance disputes. Transcripts, pp. 191-96. A business manager of the Patternmakers Association of Birmingham told an EEOC investigator that "there were no qualified niggers." Transcript, pp. 410, 473, see 438-39.

the seniority system in 1971. The international representative testified that he participated in the 1971 negotiations, that the membership had agreed to the proposal providing for inter-union transfer, and that the proposal "absolutely" should have been included in the collective bar gaining agreement. Transcript, pp. 426-28. When the representative was shown on the stand that the proposal had not been included in the agreement, he testified that he was "greatly disturbed" and that the failure to include the provision was "a violation of our bylaws." Transcript, pp. 429, 462. The Steelworkers' representative testified that the AFL Unions did not discuss why they refused to modify the discriminatory seniority system in 1971. Plaintiffs' exhibit 47, p.45.

Despite the efforts of the company and the Steelworkers to modify the seniority system, the system remained discriminatory because of the resistance of the AFL Unions until the entry of the settlement agreement in 1980. .

3. The decision of the appellate court is limited to this unique and specific factual record. The evidence of intentional discrimination is based upon a particular history of interaction over a period of 40 years between eight AFL Unions, the Steelworkers and United States Pipe and Foundry Company. The appellate decision based upon this particular factual record does not present issues of law of any general importance which may be applicable to resolve issues arising in other factual

contexts.[13/]

4. The appellate court applied the proper standard in evaluating whether the findings of the district court were clearly

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13/ Contrary to the assertion of petitioners, No. 81-1118, p. 19, the appellate decision does not conflict with the decisions of the Fourth, Sixth or District of Columbia Circuits. In Patterson v. American Tobacco Company, 634 F.2d 744, 750, n.6 (4th Cir. 1980), cert. granted on other grounds, No. 80-1199, the Fourth Circuit specifically approved the Fifth Circuit's application of Teamsters: "For guidance in addressing the issue [bona fides of a seniority system] the district court may find helpful the Fifth Circuit's decision in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 350-53 (5th Cir. 1979)." Similarly, the Sixth Circuit has specifically approved the approach taken by the Fifth Circuit in James. Equal Employment Opportunity Commission v. Ball Corp., 661 F.2d 531, 539 (1981); Taylor v. Mueller Co., 26 FEP Cases 1695, 1699-1700 (1981). The decision of the District of Columbia Circuit cited by petitioners, United States v. Trucking Employers, Inc., 561 F.2d 313 (1977), did not decide the issue of the bona fides of a seniority system and did not, in any way, conflict with the decisions of the Fifth Circuit.

erroneous. The court concluded that "the totality of circumstances surrounding the creation and maintenance of the seniority system ... 'leaves us with the definite and firm conviction that a mistake has been made....'" App. 20a. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The appellate court applied the proper standard. There is no issue properly raised concerning the application of Rule 52(a), Federal Rules of Civil Procedure, other than the question of whether on this particular record the specific conclusions of the appellate court were correct. These conclusions were correct, see pp. 11-20. In any case, it is not appropriate to grant a petition in order for this Court to sit as a second-tier appellate court to review specific findings and conclusions which have no general importance and which

do not conflict in any way with the decisions of the other circuit courts.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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